

FEDERAL CIRCUIT COURT OF AUSTRALIA

BANI HANI v MINISTER FOR IMMIGRATION & ANOR [2016] FCCA 483

Catchwords:

MIGRATION – Application to review decision of Migration Review Tribunal – whether the Tribunal failed to comply with s.359A of *Migration Act 1958* (Cth) – whether decision based upon critical factual error such as to establish jurisdictional error.

Legislation:

Migration Act 1958 (Cth), ss.5F, 357A, 359A, 424A
Migration Regulations 1994 (Cth), reg.1.15A

Cases cited:

Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 225 CLR 88; [2005] HCA 72
Kanagul v Minister for Border Protection & Anor [2014] FCCA 1219
Khan v Minister for Immigration and Citizenship (2011) 192 FCR 173; [2011] FCAFC 21
Minister for Immigration and Border Protection v SZSRS (2014) 309 ALR 67; [2014] FCAFC 16
Minister for Immigration and Citizenship v Chamnam You [2008] FCA 241
Minister for Immigration and Citizenship v SZLSP (2010) 187 FCR 362; [2010] FCAFC 108
Minister for Immigration and Citizenship v SZNPG (2010) 115 ALD 303; [2010] FCAFC 51
Minister for Immigration and Multicultural Affairs v SZGMF [2006] FCAFC 138
NAVIM v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 99
NBKT v Minister for Immigration and Multicultural Affairs (2006) 156 FCR 419; [2006] FCAFC 195
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 294; [2005] HCA 24
SFGB v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 77 ALD 402; [2003] FCAFC 231
SZBYR v Minister for Immigration and Citizenship (2007) 235 ALR 609; [2007] HCA 26
SZEOP v Minister for Immigration and Citizenship [2007] FCA 807
SZGPQ v Minister for Immigration and Citizenship [2007] FCA 648

SZLIQ v Minister for Immigration and Citizenship [2008] FCA 1405
SZNGO v Minister for Immigration and Citizenship & Anor (2010) 184 FCR 505; [2010] FCA 297
SZQHH v Minister for Immigration and Citizenship (2012) 200 FCR 223; [2012] FCAFC 45

Applicant:	SALEM AHMED SALEM BANI HANI
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 1962 of 2013
Judgment of:	Judge Barnes
Hearing date:	24 February 2015
Date of Last Submission:	9 March 2015
Delivered at:	Sydney
Delivered on:	10 March 2016

REPRESENTATION

Counsel for the Applicant: Mr D. Godwin

Solicitors for the Applicant: Dobbie and Devine Immigration Lawyers

Counsel for the Respondents: Ms B. Tronson

Solicitors for the Respondents: DLA Piper

ORDERS

- (1) The name of the Second Respondent be amended to read “Administrative Appeals Tribunal”.
- (2) A writ in the nature of certiorari issue directed to the Second Respondent, quashing the decision of the Second Respondent made on 7 August 2013 in Tribunal case number 1105175.
- (3) A writ in the nature of mandamus issue directed to the Second Respondent, requiring the Second Respondent to determine according to law the application for review of the decision of the delegate of the First Respondent made on 6 May 2011.

(i)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 1962 of 2013

SALEM AHMED SALEM BANI HANI

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Background

1. This is an application for review of a decision of the Administrative Appeals Tribunal (formerly the Migration Review Tribunal) dated 7 August 2013. The Tribunal affirmed a decision of a delegate of the First Respondent not to grant the Applicant a Partner (Temporary) (Class UK) visa.
2. The Applicant, a Jordanian born in 1987, arrived in Australia in February 2007 as a holder of a Student visa. His last Student visa ceased on 30 June 2008.

3. On 28 May 2010, Mr Bani Hani applied for a Partner visa on the basis that he was the spouse of an Australian citizen, Ms Adelina Jackson. Ms Jackson, who was born in 1963 in the Philippines, came to Australia in 1991 and is an Australian citizen. She sponsored Mr Bani Hani's visa application.
4. In a written statement provided in support of the visa application Ms Jackson claimed that she met Mr Bani Hani on 8 April 2009, that she began a relationship with him three weeks later, that they reached a decision that they wanted to commit on 26 January 2010 and that they married on 6 March 2010. Mr Bani Hani provided a statement containing similar details about the start of the relationship and date of the marriage, although he claimed they made the decision to get married on 26 April 2010 (sic).
5. However on 6 July 2010 Ms Jackson wrote the first of several letters to the Department of Immigration (the "July 2010 Letter"). She withdrew her sponsorship, explaining that this was because there was too much violence and her husband kept abusing and punching her. She stated that she had sought an apprehended violence order (an AVO). She also provided information about the start of the relationship that was inconsistent with the claims she had made in support of the original application. She stated, among other things, that she and Mr Bani Hani had not met until 19 December 2009 and that their first date was on 2 January 2010. She claimed that after two dates he had said that she was too old for him, but that he changed his mind in February 2010 and then wanted to marry her as soon as possible. He moved into her home on 28 February 2010. She claimed that he never helped her to pay rent or bills or for food. She also claimed that from 4 May 2010 until 11 May 2010 she and Mr Bani Hani had separated because she caught him gambling. She claimed that on 15 May 2010 he brought another woman to their home and also brought friends to stay on 2 June 2010. She claimed that a Lebanese woman told her that Mr Bani Hani was going to look for a young girl after he obtained residency.
6. Ms Jackson provided the Department with copies of a police application for an apprehended domestic violence order dated 11 June 2010 and a witness statement she had made on 11 June 2010 in which

she described the background to the relationship and made claims about violence and threats by her husband.

7. On 7 July 2010 the Department advised Mr Bani Hani that it had been informed that his relationship was no longer continuing. It gave him an opportunity to comment on this information. The Department also acknowledged Ms Jackson's withdrawal of sponsorship.
8. On 15 July 2010 Ms Jackson advised the Department in writing that she wished to continue as Mr Bani Hani's sponsor.
9. However by letter of 22 September 2010 Ms Jackson again informed the Department that she wished to withdraw her sponsorship (the "September 2010 letter"). She stated that since July 2010 she and Mr Bani Hani had not lived together because she had caught him cheating and that he wanted to use her to stay in the country. She claimed that she intended to apply for a divorce, that they were not living together and that they did not have a relationship.
10. The Department acknowledged the withdrawal of sponsorship.
11. On 3 November 2010, Ms Jackson again advised the Department that she wished to sponsor Mr Bani Hani. She claimed that they had come back together as husband and wife and that "*this time*" the relationship was genuine.
12. On 4 November 2010 the Department wrote to Mr Bani Hani inviting him to provide further information, in particular evidence that his relationship with Ms Jackson was genuine and continuing. On 8 November 2010 the Department invited Mr Bani Hani to address the issue of whether there were compelling reasons for waiving the requirement in Schedule 3 to the *Migration Regulations 1994* (Cth) (Migration Regulations) that an application for a Partner visa be lodged within 28 days of the applicant's substantive visa ceasing.
13. On 10 November 2010 Ms Jackson again wrote to the Department withdrawing her sponsorship (the "November 2010 Letter"). She stated that she had changed her mind because she and Mr Bani Hani fought too much "*for everything like food and other expenses (sic)*", that Mr Bani Hani just wanted to use her to stay in the country and that he was "*still cheating*" on her. She claimed that she had read a text

message on his phone to a Korean girl saying what they planned to do after he obtained residence. She said that she had kicked him out that day and that she intended to apply for a divorce as soon as possible.

14. On 23 November 2010 Ms Jackson advised the Department that she and Mr Bani Hani were “*back together*” and “*husband and wife and genuine relationship*”. She claimed they had joint bank accounts and a joint electricity bill and provided supporting documentation.
15. On 8 December 2010 Mr Bani Hani’s migration agent wrote to the Department responding to the letter of 8 November 2010. The agent claimed, among other things, that Mr Bani Hani was currently in a “*long standing*” relationship with Ms Jackson, that they had lived together since 6 March 2010 (the date of their marriage) and that they had been in a “*genuine, exclusive relationship since April 2008 (sic)*”. The agent stated that although Mr Bani Hani and his wife had had marital issues in the past, they had “*now cleared their misunderstandings*” and were involved in a more understanding and stable relationship. The agent provided statutory declarations from Mr Bani Hani and Ms Jackson attesting to their commitment.
16. On 20 January 2011 the Department invited Mr Bani Hani and Ms Jackson to attend an interview on 4 February 2011.
17. On 14 March 2011 Ms Jackson again wrote to the Department (the “March 2011 Letter”) advising that she and Mr Bani Hani had been separated since 27 January 2011, that she could not sponsor him, that he had had “*too much love affairs*”, and that he was too young for her, not in a genuine relationship, a liar, and violent. She claimed that Mr Bani Hani had made her sign papers that said that he supported her financially and helped her with bills, but that he had not done so. She claimed that her husband had not been living with her “*since December 2010*”, that she caught him going to her friend and a Lebanese girl “*for sex*”, that he just wanted to use her so he could stay in Australia and that she was going to divorce him.
18. The Department acknowledged receipt of this letter by letter of 21 March 2011. It reminded Ms Jackson of the circumstances in which a person may be granted a Partner visa although a relationship had

broken down (including as a proven victim of domestic violence committed by the sponsor).

19. On 21 March 2011 the Department also wrote to Mr Bani Hani (at the same address as the address for Ms Jackson) giving him the opportunity to comment on information the Department had received that his relationship with his sponsor had ceased.
20. On 24 March 2011 Ms Jackson wrote to the Department advising that she again wanted to sponsor Mr Bani Hani and that they were living as a couple.
21. On or about 3 May 2011 Ms Jackson wrote to the Department (the “May 2011 Letter”). Although the letter is dated 3 May 2010 (sic) it refers to events of April and early May 2011. Ms Jackson stated that from December 2010 until 5 March 2011 she and Mr Bani Hani had separated, that she went to the Philippines to forget him, but that he was waiting for her on her return to Australia, so she gave him another chance. Ms Jackson claimed that Mr Bani Hani was still cheating on her with two women, including a woman he had known before he knew her, but could not marry as she was only separated from her husband. She claimed Mr Bani Hani and this woman had used her so he could stay in Australia, that she made a mistake taking him back and that she had caught him in her home with the woman. She claimed that as at 29 April 2011 Mr Bani Hani was going to leave her, that he had told her to give a car that was in his name (which she claimed she had paid for) to his friend and that he had damaged property at her home. She made other allegations about Mr Bani Hani, including that he had called the police to “*set her up*” and had sought an AVO against her. She enclosed a copy of the apprehended domestic violence order made in her favour on 30 June 2010 and also a copy of a bond to comply with conditions imposed on Mr Bani Hani dated 22 October 2010 for common assault and contravening a prohibition or restriction in an AVO.
22. Ms Jackson also sent the Department a copy of her statement to the police of 4 May 2011 in response to Mr Bani Hani’s application for an AVO against her. In that statement she alleged that Mr Bani Hani had sought the AVO because the Department had advised that if he was a victim of domestic violence by the sponsor then he may be allowed to

stay in Australia. She made allegations of continuing violence by Mr Bani Hani from July 2010.

23. In a further letter to the Department dated 5 May 2011 (the “Second May 2011 Letter”) Ms Jackson claimed that Mr Bani Hani had deceived her, lied and set her up in order to stay in Australia. She provided the Department with a contact address for Mr Bani Hani.
24. On 6 May 2011 the delegate refused Mr Bani Hani’s visa application. The letter of refusal and decision record both stated that the sponsor had “*repeatedly withdrawn and reinstated sponsorship, a situation that the department cannot allow to continue indefinitely*”. The delegate found that without a sponsor the Applicant did not meet the requirements in subclause 820.221(1) of Schedule 2 to the Migration Regulations. The decision record listed each letter of withdrawal and reinstatement and supporting documents. It recorded that “[o]n each withdrawal occasion the sponsor claimed that the applicant had used the relationship to obtain a visa to remain in Australia only and that the relationship is not a genuine spouse one” and that Ms Jackson had “*repeatedly claimed that the applicant had ‘cheated on her’*” and that they “*do not live together as a couple*”. The delegate’s decision did not otherwise describe the content of Ms Jackson’s letters.

Review Application

25. The Applicant sought review by application lodged with the Tribunal on 30 May 2011. In July 2011 the Applicant’s migration agent provided the Tribunal with statutory declarations from a social worker/therapist and a psychologist (and evidence of an AVO obtained on 22 July 2011) in support of Mr Bani Hani’s claim that he had experienced domestic violence at the hands of Ms Jackson. It was claimed that Mr Bani Hani was suffering from post-traumatic stress disorder, major depressive disorder and generalised anxiety disorder.
26. On 26 April 2013 the Tribunal invited Mr Bani Hani to attend a hearing on 19 July 2013. His new authorised recipient, Mr Laba Sarkis, provided further information in support of the application, including a Local Court document recording that on 28 November 2012 Ms Jackson had been found guilty of an offence of contravening a

prohibition/restriction in an apprehended violence order and placed on a good behaviour bond.

27. The Applicant and two supporting witnesses attended the Tribunal hearing. Ms Jackson was not invited to the hearing. The only evidence before the court of what occurred in the Tribunal hearing is the Tribunal's account in its reasons for decision.
28. On 22 July 2013 the Tribunal wrote to the Applicant pursuant to s.359A of the *Migration Act 1958* (Cth) (the "Migration Act") inviting him to comment on various items of information (the "s.359A letter"). This letter is discussed further below. Relevantly, the Tribunal put to the Applicant for comment aspects of the letters written to the Department by Ms Jackson withdrawing her sponsorship and her statement to the police of 11 June 2010.
29. The only response to the s.359A letter appears to be a letter of 1 August 2013 from the Applicant's authorised recipient providing supporting statutory declarations referring to the relationship and other information. This letter asked the Tribunal to "*refer to the many withdrawal of the relationship then the reinstatement which indicates that there was a commitment and love between the couple and the behaviour of the Australian sponsor leads to her unstable condition and disturbance (sic)*".

The Tribunal Decision

30. On 7 August 2013 the Tribunal affirmed the decision not to grant the Applicant a Partner visa.
31. In its statement of reasons the Tribunal referred to the fact that the delegate had noted that Ms Jackson had withdrawn her sponsorship on five occasions. It recorded that after Mr Bani Hani had applied for review he had provided information that the relationship had ended and had claimed that he was the victim of domestic violence committed by Ms Jackson.
32. However the Tribunal found, for reasons which it gave, that Mr Bani Hani and Ms Jackson were "*never spouses within the meaning of the Act and regulations*".

33. The Tribunal summarised the oral evidence of Mr Bani Hani and his witnesses. It recorded that he claimed that he met Ms Jackson in April 2009 and lived with her at her home from the time of their marriage on 6 March 2010 until their separation on 3 May 2011 and referred to his evidence about their relationship. In particular the Tribunal recorded that Mr Bani Hani denied that he married Ms Jackson for the purposes of obtaining a visa; acknowledged they separated briefly in June 2010, but claimed they reconciled; and claimed they paid bills from a joint account and jointly contributed to the rent.
34. The Tribunal observed that at the hearing, after it had “*noted*” that Ms Jackson had withdrawn her sponsorship on a number of occasions, Mr Bani Hani had replied that she was “*insecure about the relationship*” and suggested that she had listened to friends who were putting bad thoughts into her head, but that she did not want to lose him.
35. Mr Bani Hani confirmed that the relationship had ended. According to the Tribunal he claimed that they had argued, that Ms Jackson had accused him of being unfaithful and that she had followed him to work and was jealous. The Tribunal stated:

22. Mr Bani Hani indicated that following an argument in June 2010 he did not live with Ms Jackson for a few weeks. The tribunal noted the contents of the letter written by Ms Jackson on 22 September 2010 at (sic) indicated that they had not lived together since July 2010. The tribunal also noted that the second joint account was opened on 22 November 2010. The tribunal put to Mr Bani Hani that based on this evidence it appears that he may not have been living with Ms Jackson from July until September/October 2010. Mr Bani Hani denied this to be the case and said that the separation in June/July was only for a short time. The tribunal asked why Ms Jackson waited nearly three months to renew sponsorship if separation was only for a few weeks. Mr Bani Hani replied that Ms Jackson wanted to make sure that the relationship was strong. Mr Bani Hani also denied the contents of one of Ms Jackson’s letters that suggested that she found Mr Bani Hani having sex with another person. He also denied Ms Jackson’s allegations that he had a Korean girlfriend and that he also had a relationship with a Lebanese woman.

23. The tribunal noted the contents of the letter written by Ms Jackson that indicated that they met in December 2009, had a few

dates and that in March 2010 Mr Bani Hani urgently proposed to her. Mr Bani Hani denied this to be the case and reiterated that they met in April 2009, had many dates in the (sic) first discussed getting married on Australia Day 2010 at Darling Harbour when they were watching fireworks.

36. The Tribunal recorded that Mr Bani Hani also gave oral evidence about domestic violence he claimed Ms Jackson had committed. He provided an explanation for having been placed on a good behaviour bond after events of 20 October 2010. He claimed the complete breakdown of the relationship occurred in May 2011 when Ms Jackson came to his workplace, shouted, accused him of being unfaithful, threw things at him and threatened him with harm.
37. Under the heading “*Comments/response to adverse information*” the Tribunal stated that the departmental file contained “*various letters written by Ms Jackson that at face value contradict aspects of Mr Bani Hani’s evidence about the relationship*” and observed that “***[t]he context of Ms Jackson’s letters suggests that the relationship between the parties was contrived solely for migration purposes***” (emphasis added).
38. The Tribunal referred to the fact that on 22 July 2013 it had written to Mr Bani Hani under s.359A of the Migration Act putting to him information that was said to include his visa history and “*relevant excerpts*” from Ms Jackson’s letters “*concerning the inception of the relationship; financial aspects of the relationship and the parties’ cohabitation*”. It recorded that on 2 August 2013 it received Mr Bani Hani’s response.
39. In its findings and reasons the Tribunal stated that the first question was whether Mr Bani Hani was Ms Jackson’s “*spouse...within the meaning of s.5F of the Act at the time of the visa application*”. It found that at the time of the visa application, Mr Bani Hani and Ms Jackson were married and hence met s.5F(2)(a) of the Act. The Tribunal stated that in forming an opinion as to whether they had a mutual commitment to a shared life to the exclusion of others, whether their relationship was genuine and continuing and whether they lived together or did not live separately and apart on a permanent basis (as

required under s.5F(2)(b), (c) and (d) of the Act) it had had regard to “*all of the circumstances of the relationship*”.

40. The Tribunal made “[g]eneral comments regarding credibility”. It found that Mr Bani Hani did not present as a particularly compelling witness and that his evidence about the nature of his relationship with Ms Jackson was “very generalised”. The Tribunal continued:

37. Given Mr Bani Hani’s claims of domestic violence, the tribunal did not invite Ms Jackson to the hearing, or take evidence directly from her. However, Ms Jackson wrote a series of letters to the department. These letters describe various stages of the history of the relationship and her views about the relationship. Significantly, there are various aspects mentioned by Ms Jackson that appear to be inconsistent with Mr Bani Hani’s evidence (emphasis added).

38. Most significantly, Ms Jackson wrote that she first met Mr Bani Hani in December 2009, as opposed to Mr Bani Hani’s evidence that they met in April 2009. For example, on 6 July 2010 Ms Jackson wrote:

“I met Salem Ahmed Bani Hani 19 Dec 2009 with my friend’s birthday party. After two weeks later Salem call me he ask date with me. First date 2 Jan 2010 second date 9 Jan 2010 and that last date. I start calling Salem and his mobile is turn off and I sent message what happening. Salem told me that I am too old for him and I said is okey no worry see u later bye. Anyway I said to Salem am going back to my ex-husband anyway. After one month later Feb 2010 he call me. Salem said to me he change his mind. Salem want to marry me as soon as possible. I said to Salem why do u want to marry me. Salem said to me he don’t want to lose me. He say sorry and he told me Salem love me”.

41. The Tribunal also referred to the claim in Ms Jackson’s witness statement of 11 June 2010 that:

“When I first met my husband before we got married, he was very urgent to get married. He told me he was in Australia on a student visa.”

42. The Tribunal found that when “*this*” was looked at in conjunction with Mr Bani Hani’s visa history, an obvious inference was that the only reason he married Ms Jackson was to attempt to obtain a visa.
43. The Tribunal stated that when it had put the “*apparent inconsistency*” concerning the inception of the relationship to Mr Bani Hani at the hearing, he had noted that Ms Jackson’s sponsorship application stated that the date they met was in April 2009 and had strongly denied that he first met her in December 2009. It also had regard to the fact that in response to the s.359A letter Mr Bani Hani had supplied statutory declarations from various friends attesting that he met Ms Jackson in April 2009 and that some of these statutory declarations (as well as Mr Bani Hani’s evidence) suggested that Ms Jackson had psychological problems and was mentally unstable.
44. The Tribunal noted that the response to the s.359A letter asked the Tribunal to note the many withdrawals then reinstatements of the sponsorship which, in the author’s view, indicated there was a commitment and love between the couple and suggested that Ms Jackson’s behaviour indicated her “*unstable condition and disturbance*”.
45. The Tribunal continued:
- ...The tribunal has no specific evidence that Ms Jackson has any psychological problems. The tribunal is not in a position to speculate on such matters. However, **Ms Jackson’s detailed letters when looked at cumulatively do have a ring of truth, particularly when compared with Mr Bank Hani’s evidence and presentation at the hearing** (emphasis added).*
46. The Tribunal considered Mr Bani Hani’s reliance on the fact that in her original statement Ms Jackson had stated they met in April 2009 and his suggestion at the hearing that Ms Jackson’s subsequent letters should be seen in light of the breakdown of the relationship. It stated:

*...The tribunal has no doubts that Ms Jackson was prepared to assist Mr Bani Hani with his visa application. After all she signed a sponsorship form. However **it is apparent from the context of her letters that she had second thoughts about her actions in sponsoring Mr Bani Hani.** As the covering letter in the s.359A response noted, Ms Jackson withdrew her sponsorship*

*on various occasions. The tribunal is being asked to find that the actions of Ms Jackson in reinstating the sponsorships (sic) somehow show some level of commitment between the parties. The tribunal does not accept this proposition. **The context and content of Ms Jackson's letters appears to demonstrate that Ms Jackson was distressed at being made a fool of by Mr Bani Hani in agreeing to help him in his visa application.** As noted in the excerpts of the letters in the s.359A letter, Ms Jackson appears to have a view that Mr Bani Hani has used her, a woman 24 years older than him who lives in Department of Housing accommodation and usually reliant (sic) on Centrelink payments, in a ploy to obtain a visa (emphasis added).*

47. The Tribunal also had regard to the fact that, as noted in the s.359A letter, there was inconsistent evidence regarding financial arrangements. It found that Ms Jackson had indicated that Mr Bani Hani made little contribution to the household during the time they lived at the same address and that this was inconsistent with Mr Bani Hani's evidence about their financial arrangements. It recorded that Mr Bani Hani had not responded to this aspect of the s.359A letter.

48. In addition, the Tribunal found that there was inconsistent evidence referred to in the s.359A letter concerning the period of cohabitation. It stated that "**Ms Jackson's letters refer to lengthy periods that they were not living at the same premises**" (emphasis added). It found that this appeared to be inconsistent with Mr Bani Hani's evidence that there was only a short separation in the middle of 2010. It noted that Mr Bani Hani had not responded to this aspect of the s.359A letter.

49. The Tribunal continued:

*45. The tribunal considered the above noted inconsistencies cumulatively and also noted Mr Bani Hani's response to the s.359A letter. The tribunal concludes that based on these inconsistencies is (sic) unable to find Mr Bani Hani a credible witness when it come to the nature of his relationship with Ms Jackson. Therefore, **the tribunal is not prepared to accept his evidence at face value, and prefers Ms Jackson's version of events** (emphasis added).*

50. The Tribunal then addressed the evidence before it as to the financial aspects of the relationship. It found that while the "*parties*" had two joint bank accounts, they also had their own accounts in which their

respective sources of income were deposited and that they did not own any significant assets or have joint liabilities. It concluded that, “[b]ased on Ms Jackson’s letters” it did not accept that there was any significant pooling of financial resources or significant sharing of day to day expenses. It had regard to text messages from Ms Jackson to Mr Bani Hani (provided by Mr Bani Hani) complaining that he was not paying his rent and also to the fact that her “*letters*” referred to him not contributing to the household. It acknowledged that Mr Bani Hani had given evidence denying this to be the case, but for the reasons it had given “*prefer[red] Ms Jackson’s evidence on this point*” (emphasis added).

51. As to the nature of the household, the Tribunal accepted “*from the context of Ms Jackson’s letters that the parties cohabitated for a period of time at Ms Jackson’s address*” (emphasis added). It acknowledged Mr Bani Hani’s evidence that he and Ms Jackson separated briefly in June/July 2010 but found that “*Ms Jackson’s letters suggest that there were lengthy periods where they were not cohabitating*” (emphasis added). It was acknowledged that there was “*common ground*” that at some period of time the parties cohabitated.
52. Under the heading “*Social aspects*” the Tribunal accepted that Mr Bani Hani and Ms Jackson knew each other and that they had, on occasion, socialised together. It found that there was “*no evidence or suggestion that the parties have ever taken holidays together*”. It noted that while various people associated with Mr Bani Hani had attested to the relationship, there was no evidence from anyone in Ms Jackson’s family. It accepted that Mr Bani Hani’s father had visited Australia and that he had met Ms Jackson.
53. Under the heading “*Nature of the commitment*” the Tribunal recorded:

51. As discussed above the tribunal prefers Ms Jackson’s statement that the parties met in late 2009. They had a few dates and Mr Bani Hani requested marriage, apparently urgently. Ms Jackson withdrew her sponsorship on various occasions before the delegate’s decision. As noted above, Ms Jackson claims that she had caught Mr Bani Hani cheating on her. Mr Bani Hani denies this to be the case. He provided the tribunal with copies of text messages from Ms Jackson that appear to accuse him of being a liar and very dishonest. Mr Bani Hani claims that Ms

*Jackson's accusations of his infidelity are based on her (unfounded) jealousies. However, **the tribunal prefers Ms Jackson's version of events.** The tribunal finds that Mr Bani Hani to be a particularly unimpressive witness (sic) when it comes to evidence about his commitment to Ms Jackson. **Ms Jackson's detailed letters on the other hand are heartfelt.***

52. Based on Ms Jackson's letters, the tribunal accepts that the parties used to communicate with each other.

53. The tribunal does not accept Mr Bani Hani's evidence that he ever saw the relationship with Ms Jackson as being long-term. (emphasis added)

54. The Tribunal was prepared to accept that the couple were legally married, that they had opened two joint bank accounts and that “*for a period of time*” they had shared the same address. It noted that various people had attested to the existence of their relationship. It acknowledged that marrying someone with a view to obtaining a migration outcome “*does not necessarily preclude the concept that the relationship itself is genuine*”. However the Tribunal found that the question was not whether Mr Bani Hani had married Ms Jackson to obtain a visa, but rather whether he had a genuine commitment to the relationship. It did not find him to be a credible witness on this point.
55. On the evidence before it the Tribunal was not satisfied that at the time of the visa application Mr Bani Hani and Ms Jackson had a mutual commitment to a shared life to the exclusion of all others or that the relationship was “*ever*” genuine and continuing. It found that it therefore did not meet the requirements of s.5F(2)(b) and (c) of the Act for a married relationship.
56. The Tribunal was not satisfied that at the time of the visa application Mr Bani Hani was Ms Jackson's “*spouse*”. Hence it found that he did not meet the criterion in cl.820.211(2)(a) of the Migration Regulations. As he did not satisfy this time of application criterion, the Tribunal found it unnecessary to consider time of decision criteria or Schedule 3 requirements. It affirmed the decision not to grant Mr Bani Hani a Partner visa.

These Proceedings

57. The Applicant sought review by application filed in this Court on 22 August 2013. He now relies on a Further Amended Application filed with leave of the court on the day of the hearing.
58. The parties were given the opportunity to file submissions after the hearing in relation to a new ground raised in the Further Amended Application and other issues that emerged at the hearing.

Section 359A of the Migration Act

59. The first ground in the Further Amended Application is that the Tribunal failed to comply with s.359A of the Migration Act. The particulars to this ground are as follows:

(i) The Tribunal failed to comply with the requirements of s 359A in respect of all of the information in the letters from the Applicant's spouse to the Department that would have been the reason or part of the reason for affirming the decision under review.

60. Section 359A of the Migration Act is relevantly as follows:

(1) Subject to subsections (2) and (3), the Tribunal must:

(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and

(c) invite the applicant to comment on or respond to it.

...

(4) This section does not apply to information:

...

(b) that the applicant gave for the purpose of the application for review; or

61. The Tribunal's s.359A letter of 22 July 2013 set out particulars of information as follows:

Visa history/ evidence concerning inception of the relationship

- The department's records indicate that you arrived in Australia on 4 February 2007 on a subclass 570 student visa. This visa ceased on 30 June 2008. On 4 July 2008 you applied for another student visa. However on 14 August 2008 the department refused to grant you the visa. On 8 January 2010 the Migration Review Tribunal affirmed the department's decision. On 8 February 2010 you sought Ministerial intervention. However on 27 April 2010 the Minister declined to intervene. On 28 May 2010 you lodged the current spouse visa application on the basis of your marriage to Ms Jackson.*
- On 6 July 2010 Ms Jackson wrote a letter that relevantly provides: "I met Salem Ahmed Bani Hani 19 Dec 2009 with my friend's birthday party. After two weeks later Salem call me he ask date with me. First date 2 Jan 2010 second date 9 Jan 2010 and that last date. I start calling Salem and his mobile is turn off and I sent message what happening. I start calling Salem and his mobile is turn off and I sent message what happening. Salem told me that I am too old for him and I said is okey no worry see u later bye. Anyway I said to Salem am going back to my ex-husband anyway. After one month later Feb 2010 he call me. Salem said to me he change his mind. Salem want to marry me as soon as possible. I said to Salem why do u want to marry me. Salem said to me he don't want to lose me. He say sorry and he told me Salem love me".*
- A witness statement dated 11 June 2010 taken at Surry Hills Police Station by Ms Jackson in part provides: "When I first met my husband before we got married, he was very urgent to get married. He told me he was in Australia on a student visa."*

The above information is relevant because you gave evidence that you met Ms Jackson in April 2009 and that you had numerous dates. You also stated that you and Ms Jackson discussed marriage on Australia Day (26 January 2010) at Darling Harbour.

Your evidence appears to be inconsistent with the contents of Ms Jackson's letter.

This inconsistency could lead the Tribunal find (sic) that your evidence concerning the inception and history of the relationship is not credible. The Tribunal may find that you met Ms Jackson in December 2009 and hastily married her. When this is looked at in conjunction with your visa history, this could lead the Tribunal to infer that the only reason that you married Ms Jackson was to attempt to obtain a visa. The Tribunal could find that you never had any intention of having a mutual commitment to a shared life as husband and wife to the exclusion of others and that you never intended that the relationship be ongoing.

This could lead the Tribunal to find that your relationship with Ms Jackson was never at any stage genuine and continuing.

This in turn would be a part of the reason for the Tribunal affirming the decision under review.

Evidence concerning financial affairs

- *Ms Jackson's letter of 6 July 2010 indicates that you never helped Ms Jackson "to pay the rent and bills and food".*
- *A witness statement dated 11 June 2010 taken at Surry Hills Police Station by Ms Jackson in part provides: "I said to him "Have you paid the rent?" He said "No, I don't pay for nothing." He then grabbed my rental card and threw it at me."*
- *Ms Jackson's letter of 10 November 2010 provides in part: "We fight too much for everything like food and other expenses for any bill. He just want to use me to stay in this country. He work 6 days a week he can't even spend food to me or nothing."*
- *Ms Jackson's letter dated 14 March 2011 provides in part: "He make me sign this papers that he supports me for financial and help me for bill he never do anything."*

The above information is relevant because you gave evidence that during the period from March 2010 to May 2011 you and Ms Jackson used to share household bills.

Your evidence appears to be inconsistent with Ms Jackson's letters and statement to the police.

The inconsistency in evidence could lead the Tribunal to not accept your evidence that you financially contributed to household (sic) during the period that you lived at the same address as Ms Jackson. This could also lead the Tribunal to not accept your evidence about other aspects of your relationship with Ms Jackson. In particular the Tribunal could find that your relationship with Ms Jackson was never at any stage genuine and continuing.

This in turn would be a part of the reason for the Tribunal affirming the decision under review.

Evidence concerning cohabitation

- *Ms Jackson's letter dated 22 September 2010 states in part: "Since July 2010 we are not live together because after 2 week 27 July 2001 (sic) I catch his cheating.....[I have had] nothing to do with Salem Ahmed Bani Hani since July 2010. He use my address his letters for to do Government."*

The above information is relevant because you gave evidence that apart from a few weeks in June/July 2010 you and Ms Jackson shared the same address at Surry Hills from March 2010 to May 2011.

Your evidence appears to be inconsistent with Ms Jackson's letter and statement to the police.

The inconsistency in evidence could lead the Tribunal to not accept your evidence concerning the periods of time you were living at Surry Hills. This could also lead the Tribunal to not accept your evidence about other aspects of your relationship with Ms Jackson. In particular the Tribunal could find that your relationship with Ms Jackson was never at any stage genuine and continuing.

This in turn would be a part of the reason for the Tribunal affirming the decision under review.

All of the above information

All of this information above may be relevant to affirming the decision under review as it may indicate that at the time of the visa application you and Ms Jackson may not have been living together; or not living apart on a permanent basis; may not have been in a genuine and continuing relationship; and that you may not have had a mutual commitment to each other as husband and

wife, to the exclusion of all others. This may indicate that you may not meet the definition of “spouse” in regulation 1.15A of the Migration Regulations 1994.

If the Tribunal finds that Ms Jackson was not your spouse at the time of application, it may find that clause 820.211 of Schedule 2 to the Migration Regulations 1994 is not satisfied.

If the Tribunal finds that this clause is not satisfied it must affirm the decision under review to refuse to grant a Class UK visa.

Applicant's submissions

62. The Applicant submitted that the s.359A letter dated 22 July 2013 failed to meet the requirements of s.359A(1) of the Migration Act. In essence, it was submitted that the letter did not set out all of the information contained in the letters from the sponsor (Ms Jackson) that the Tribunal considered would be the reason or part of the reason for affirming the delegate’s decision and also that the Tribunal failed to comply with s.359A(1)(b) in relation to some information that was included in the s.359A letter.
63. The Applicant’s primary submission was that the entirety of Ms Jackson’s letters to the Department withdrawing her sponsorship should have been put to the Applicant. In the alternative, it was contended that the Tribunal had erred in failing to provide sufficient particulars of Ms Jackson’s letters in the s.359A letter.
64. In support of the first of these propositions reliance was placed on the remarks of Flick J in *SZNGO v Minister for Immigration and Citizenship & Anor* (2010) 184 FCR 505; [2010] FCA 297 at [23] in relation to s.424A of the Act (the equivalent of s.359A in relation to the Refugee Review Tribunal) to the effect that information “*cannot in all cases be clinically divorced from the context in which it appears. How much of that surrounding context must also be disclosed must necessarily depend upon the facts and circumstances of each individual case*”. It was pointed out that his Honour suggested that s.424A required the disclosure “*of so much as to ensure that the opportunity to ‘comment... or respond...’ is meaningful*” (at [23]) and submitted that in this case s.359A required disclosure of the entirety of Ms Jackson’s letters.

65. It was also submitted that the scope of the information within s.359A was not limited to the specific parts referred to in the Tribunal's reason for decision (see *Khan v Minister for Immigration and Citizenship* (2011) 192 FCR 173; [2011] FCAFC 21). At the same time, counsel for the Applicant submitted that it was relevant that, ultimately, the Tribunal was not satisfied that Mr Bani Hani had the commitment to Ms Jackson required under the applicable Regulation and that when considering the nature of the relationship it had preferred Ms Jackson's "*version of events*" as set out in the various letters in which she withdrew her sponsorship of Mr Bani Hani. It was pointed out that in its reasons for decision the Tribunal had expressly relied upon the whole of the content of the letters, referring to "*Ms Jackson's detailed letters, when looked at cumulatively*" and to the "*context and content of Ms Jackson's letters*" and that it had preferred Ms Jackson's version of events. It had also relied on a finding that Ms Jackson's detailed letters were "*heartfelt*" (compared to what the Tribunal saw as the unimpressive nature of Mr Bani Hani's evidence about his commitment to Ms Jackson).
66. In addition the Tribunal had considered the sponsor's letters looked at cumulatively and the context and content of those letters and then "*noted*" inconsistencies cumulatively before concluding that, based on those inconsistencies, it was unable to find that Mr Bani Hani was a credible witness when it came to the nature of his relationship with Ms Jackson and that it preferred Ms Jackson's "*version of events*".
67. It was submitted that in this case specific items of information could not be divorced from the context in which they appeared, as the Tribunal itself had relied upon that context as being significant. It was contended that, in effect, the Tribunal had suggested that *all* the information in those letters was part of the reason for affirming the decision under review.
68. The Applicant submitted that in circumstances where in substance the Tribunal had relied upon Ms Jackson's letters as her "*evidence*" of the couple's relationship (as opposed to the version of events given by the Applicant) and had treated the material from Ms Jackson in this comprehensive way, then as a matter of basic fairness the Applicant should have been given access to the whole of that material pursuant to

s.359A of the Act. In particular, it was submitted that it was relevant that the Tribunal had taken the sponsor's letter as her evidence in circumstances where it had not asked her to attend the Tribunal hearing because of the allegations of domestic violence and that reg.1.15A required that regard be had to "*all of the circumstances*" of the relationship in determining whether the sponsor and the Applicant were in a married relationship.

69. It was also submitted that s.357A(3) of the Migration Act specifically required the Tribunal to meet its obligations under s.359A in a way that was fair and just and that the opportunity to comment on the information must be such that the Applicant could address the concerns of the Tribunal. The Applicant submitted that where the concerns of the Tribunal included the "*context*" of the information, it was necessary as a matter of fairness and justice for the Applicant to be appraised of that context. On this basis it was submitted that the Tribunal should have put all of the letters from Ms Jackson to the Applicant for comment under s.359A of the Act.
70. In the alternative, it was contended that everything that was adverse in any sense in Ms Jackson's letters should have been put to the Applicant as information that went to the overall finding in relation to the circumstances of the relationship and thus was information that the Tribunal considered would be the reason or part of the reason for affirming the decision under review. In this context it was submitted that such information would also include information in the letters or from Ms Jackson that would bear on whether or not the Applicant had been a victim of domestic violence. It was submitted that such information should have been put to the Applicant to the extent that such information undermined that claim.
71. It was contended that the Applicant needed to see each of Ms Jackson's allegations in order to have a meaningful opportunity to respond to them (see *SZNGO* at [23]).
72. The Applicant referred, in some detail, to the matters canvassed in the letters from Ms Jackson and drew attention to particular relevant matters referred to in the letters (which the Tribunal treated as her "*evidence*") which were said to reflect adversely on the nature of Mr Bani Hani's commitment, but which were not all included in the

Tribunal's s.359A letter. For example, it was pointed out that on 6 July 2010 Ms Jackson wrote a 9 page letter withdrawing her sponsorship. Among other things she explained why she was doing so, she recounted violent incidents between herself and Mr Bani Hani and concluded:

I don't want to die. I don't want involved this relationship with Salem Ahmed Bani Hani – he too much violence to me.

73. The Applicant submitted that this information bore upon whether the relationship was genuine.
74. It was also pointed out that in her witness statement of 11 June 2010 (provided with the July 2010 letter) Ms Jackson had described an incident in which Mr Bani Hani abused, swore and yelled at her, but that only part of the information in the witness statement had been put to the Applicant.
75. In submissions it was suggested that Ms Jackson's evidence in the July 2010 letter that she had been told that when Mr Bani Hani obtained residence he was going to look for a young girl was also part of the information that should have been included in the s.359A letter.
76. On 22 September 2010 Ms Jackson again advised the Department that she wished to withdraw her sponsorship. She alleged that Mr Bani Hani had used her to get a visa and said she was going to apply for a divorce. This information was said to bear on whether the relationship was genuine. The Applicant acknowledged that some aspects of the information in the September 2010 letter had been included in the s.359A letter, but pointed out that other claims in this letter (including that Mr Bani Hani wanted to use her to stay in the country, that he was not living with her, that she had been conned, that they did not "*even*" have a relationship and that he was desperate to stay in Australia and so had used her) had not, but should have been, included in the s.359A letter.
77. On 10 November 2010 Ms Jackson again withdrew her sponsorship. She said that she had read a text message on the Applicant's phone to a Korean girl saying what they planned after he got residence, that they were "*playing game with*" her, that she (Ms Jackson) had kicked the Applicant out and that she was going to apply for a divorce. This

information was said to bear on whether the relationship was genuine. It was also submitted that the fact that the Applicant claimed in this letter that Mr Bani Hani was “*still*” cheating on her was not, but should have been, in the s.359A letter.

78. On 14 March 2011 Ms Jackson advised that she and Mr Bani Hani had been separated since 27 January 2011, that he had too many love affairs (including with a friend of Ms Jackson and a Lebanese woman), that he was not genuine in the relationship, that he was a liar and violent, that when she tried to call his solicitor he ignored her, that Mr Bani Hani and his legal advisers had tried to con her, that he had not lived with her since December 2010 (sic) and that she had caught him cheating on her. She reiterated that the Applicant just wanted to use her so he could stay in Australia. It was submitted that all this information should have been included in the s.359A letter as it bore on whether the relationship was genuine.
79. On 3 May 2011 Ms Jackson again withdrew the sponsorship. The s.359A letter did not include any particulars of the information in this letter. The Applicant submitted that the reiterated claims by Ms Jackson that she and Mr Bani Hani had separated from December 2010 until 5 March 2011 and her claims that he was “*still*” cheating on her with two women, that he married her so he could continue to see a married Lebanese woman (with whom she had caught him having sex in her home) and that he used her so he could be in Australia bore upon whether the relationship was genuine and should have been put to him under s.359A of the Act. In addition, it was submitted that Ms Jackson’s accusation that the Applicant set her up by asking her to attend at his work, calling the police and making up a story about her so he could get an AVO against her bore upon whether or not the Applicant had been a victim of domestic violence and hence should also have been put to him under s.359A of the Act.
80. The Applicant also submitted that the claims in Ms Jackson’s witness statement of 4 May 2011 that in July 2010 (after the first violent incident) she realised Mr Bani Hani only married her so he could stay in Australia and that after the violent incident in October 2010 she realised he was not going to change and that he was always violent towards her should have been included in the s.359A letter. In this

statement Ms Jackson also claimed that she believed the Applicant was trying to set her up and create an incident where she would come up as the aggressor, to obtain permanent residence as a victim of domestic violence. This information (and claimed violence in September/October 2010) was said to bear upon whether or not Mr Bani Hani had been a victim of domestic violence.

81. The Applicant also contended generally that the information in the letters from the sponsor that undermined his claim to have been subjected to domestic violence by her could not be excluded as irrelevant to the issue of mutual commitment, because it undermined his claims in that regard insofar as the sponsor claimed the circumstances of the alleged domestic violence had been engineered by him for the purposes of obtaining a visa.
82. It was also pointed out that in her letter of 5 May 2011 (which was not extracted in the Tribunal's s.359A letter) Ms Jackson had advised that she had been in the Philippines between 28 January 2011 and 5 March 2011, that on return she had bought a car she that registered in the Applicant's name because she did not want to be responsible for any speeding fines he incurred, but that on 29 April 2011 he had accused her of stealing the car. She also claimed that the Applicant had deceived her and lied to her to stay in Australia, that he would do anything against her to set her up so he could stay in Australia and that since he found he could stay in Australia without her help he had told her he did not need her anymore and to get lost. It was submitted that this information should have been put to the Applicant under s.359A as it was said to bear on whether the relationship was genuine.
83. It was pointed out that the Tribunal had noted that in its findings that Ms Jackson was 24 years older than Mr Bani Hani, lived in Department of Housing accommodation and was usually reliant on Centrelink payments and had found that it appeared from her letters that Ms Jackson was of the view that the Applicant had used her in a "*ploy*" to get a visa. However the s.359A letter made no reference to these attributes. It was submitted that the Court should infer that the Tribunal considered that this assertion by such a sponsor bore upon its conclusions as to the nature of the commitment between the Applicant

and the sponsor and that hence it should have put such information to him for his comment.

84. Counsel for the Applicant acknowledged that, as recorded in the Tribunal's reasons for decision, some of these matters had been raised verbally with the Applicant in the course of the Tribunal hearing. However there was said to be no evidence or suggestion that the Tribunal had put such matters to the Applicant in accordance with s.359AA of the Act. It was also submitted that it could be inferred that at the time of the hearing those matters raised at the hearing were considered by the Tribunal to be matters which "*would*" be the reason or a part of the reason for affirming the decision under review. This was said to support the view that the Tribunal was obliged to put them to the Applicant under s.359A of the Act.
85. In addition, the Applicant submitted that there were specific inadequacies in the s.359A letter in relation to matters which were relied on by the Tribunal in its reasons for decision as part of the reason for affirming the decision under review. The Applicant submitted that even if the Court did not accept that *all* adverse matters should have been put to the Applicant, at least those parts of Ms Jackson's letters that reflected adversely upon the nature of the Applicant's commitment should have been put to the Applicant under s.359A of the Act, whether or not they were explicitly relied on in the Tribunal's reasons for decision. It was submitted that this would encompass all the parts of the letters which made allegations about the Applicant's cheating, periods of separation and claims that the Applicant was using Ms Jackson. This information was said to be highly probative and centrally relevant to the actual decision reached by the Tribunal.
86. It was pointed out that while the Tribunal had stated in its decision that Ms Jackson's letters referred to "*lengthy periods*" she and the Applicant were not living at the same premises, the s.359A letter referred only to the 22 September 2010 letter from the sponsor which related to one period of separation from July to September 2010. It was submitted that the information in other letters about different periods of separation (with which the Applicant may or may not have agreed) should also have been put to him for comment.

87. Similarly, issue was taken with the fact that the s.359A letter referred to only one allegation of cheating, whereas the Tribunal had relied on Ms Jackson's "*claims (sic) that she had caught Mr Bani Hani cheating*" to make findings about the nature of the couple's commitment. It did so in circumstances where there were allegations of cheating in more than one letter from the sponsor, including in letters which post-dated the one letter referred to in the s.359A letter. It was submitted that such claims should also have been put to the Applicant under s.359A and observed that the Applicant may well have wished to respond to or comment on such later allegations (as the Tribunal recorded that he did orally at the hearing).
88. The Applicant submitted that even if it were to be accepted that the Tribunal did not ultimately rely upon such additional allegations in its decision, it was nonetheless clear that these separate allegations of cheating would have been part of the reason for affirming the decision under review at the time of the Tribunal hearing and that for this reason such matters should have been separately identified in the s.359A letter (see *Khan* at [45] and *Kanagul v Minister for Border Protection & Anor* [2014] FCCA 1219 at [59]). It was submitted that in the absence of such particulars the Tribunal had failed to provide adequate particulars of the cheating allegations.
89. It was also pointed out that while the s.359A letter quoted Ms Jackson's claim in her letter of 22 September 2010 that she caught the Applicant cheating in July 2010 this had appeared in a passage about when she and Mr Bani Hani cohabitated. In explaining the relevance of this information in the s.359A letter the Tribunal had put the evidence about cohabitation and its inconsistency with the Applicant's evidence in that respect to Mr Bani Hani for comment, but had not explained the significance of the claim that he cheated. This was said to be significant, given that "*cheating*" was critical to the issue of mutual commitment, which was how it had ultimately been used by the Tribunal. It was submitted that in this respect the Tribunal had failed to ensure, as far as reasonably practicable, that the Applicant understood the relevance to the review of the information from Ms Jackson about his cheating as required by s.359A(1)(b) of the Act.

90. The Applicant addressed the issue of whether any of the information said to be in s.359A(1) was within the s.359A(4)(b) exception as information that the Applicant “gave” for the purpose of the application for review. He disputed the Minister’s contention that the fact that the delegate’s decision contained the dates of letters and a short passage discussing those letters was sufficient to enliven this exception. It was also contended that it was difficult to see how someone such as the Applicant could “give” something to the Tribunal “for the purposes of” his review application that he had never seen in circumstances where he did not know the content of such information.

First Respondent’s Submissions

91. The First Respondent submitted that the Tribunal had not failed to comply with s.359A of the Migration Act. It was pointed out that what was in issue was compliance with s.359A, not whether there had been a denial of procedural fairness, but submitted that even common law rules of procedural fairness did not necessarily require a decision maker to provide a person with all of the documents in which information was contained. It was also submitted that it would be surprising, in light of s.357A of the Migration Act, if the obligation in s.359A extended well beyond common law principles of procedural fairness and that insofar as the Applicant had intended to suggest that s.357A(3) added to the substantive obligations under s.359A or imported broad notions of procedural fairness into that section, this was not the case (see *Khan* at [42]-[43]).
92. In oral submissions, counsel for the First Respondent submitted that in considering whether there had been a failure to comply with s.359A of the Migration Act the first question was whether the information came within s.359A(1) and that the “starting point” for this analysis was the Tribunal’s reasons. It was submitted that this Tribunal’s reasons were highly consistent with the s.359A letter and that the principle in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Others* (1996) 185 CLR 259; [1996] HCA 6 at [30] that the Tribunal’s reasons ought not to be read with an eye too finely attuned to error ought also to be applied to the s.359A letter taking into account the purpose of that provision and notwithstanding that the authorities indicated that the requirements of s.359A were strict. In particular, it

was submitted that a s.359A letter should not be read as though the letter had necessarily been written by a legally trained person.

93. Insofar as the Applicant relied on *SZINKO* in support of the propositions that basic fairness required that he be given access to the whole of the material in the sponsor's letters and that the relevant information in this case could not be divorced from the context of the whole of the correspondence, it was submitted that the facts of this case were far removed from those of *SZINKO*.
94. In *SZINKO* the appellant visa applicant had relied on a letter from the chairman of a union council in Bangladesh. The Tribunal had seen a letter in another matter in precisely the same terms, which was said to be by a different author belonging to a different body. While it had revealed this much to the appellant, it had not informed him of the date of the document, the name of the author or the identity of the body the author purported to represent. Flick J found that the Tribunal had failed to comply with s.424A of the Act.
95. The First Respondent submitted that whether Flick J was correct to find (at [23]) that the "*touchstone*" was that ss.424A and 424AA (the sections equivalent to ss.359A and 359AA) required disclosure of so much as to ensure the opportunity to comment or respond was "*meaningful*" must be left for another court, but that in any event in the present case the Applicant was well aware of the author and dates of the correspondence as such matters had been referred to in the delegate's decision (a copy of which he had provided to the Tribunal).
96. The First Respondent also submitted that this case could be distinguished from *SZLIQ v Minister for Immigration and Citizenship* [2008] FCA 1405 in which Buchanan J (at [12]) had found that the source of the evidence relied on by the Tribunal ought to have been disclosed in circumstances where there was no discernible connection between the information in question and the visa applicant's evidence (see *Minister for Immigration and Citizenship v SZLSP* (2010) 187 FCR 362; [2010] FCAFC 108 at 395 [111]). The First Respondent submitted that, in contrast, in this case there was a clear connection between the Applicant's evidence and the information the Tribunal actually considered would be the reason or part of the reason for its

decision, in that the information came from the person the Applicant claimed to have been living with in a genuine marital relationship.

97. The First Respondent conceded that the Tribunal had referred to the whole of Ms Jackson's correspondence for the purposes of its decision, but contended that this did not mean that the whole of the correspondence attracted an obligation under s.359A of the Act. Reliance was placed on the fact that the plurality in *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609; [2007] HCA 26 had pointed out (at [17]) that the statutory criterion in s.424A (the equivalent of s.359A) did not turn on the reasoning process of the Tribunal or the Tribunal's published reasons and that the reason for affirming the decision under review was a matter that depended on the criteria for the making of that decision in the first place.
98. It was submitted that the sponsor's correspondence in its entirety could not have been the reason or part of the reason for the Tribunal's decision because it did not constitute a rejection, denial or undermining of the Applicant's claims to have been in a genuine relationship with the sponsor. It was pointed out that the relevant criterion for the subclass of visa sought by the Applicant included cl.820.211(2) in Schedule 2 to the Migration Regulations which required that, *at the time of the visa application*, the Applicant was the spouse or the de facto partner of an Australian citizen or permanent resident who was not prohibited from being a sponsoring partner. "*Spouse*" was defined in s.5F of the Act to include persons in a married relationship where those persons had a mutual commitment to a shared life as husband and wife to the exclusion of all others. The First Respondent submitted that it was relevant that while the Applicant had relied on his marriage to and relationship with Ms Jackson in order to meet the time of application criterion in cl.820.211(2), by the time the matter came before the Tribunal it was clear that the relationship was no longer in existence. On this basis it was contended that it was clear that not all of the correspondence could have been the reason or part of the reason for the decision under review.
99. In addition, the First Respondent submitted that the fact that the Tribunal had referred to the cumulative effect of Ms Jackson's letters as having a "*ring of truth*" and to the "*context*" and "*content*" of the letters

did not elevate every line in those letters to “*information*” within the meaning of s.359A or mean that the Tribunal necessarily relied on all parts of the letters but, rather, simply revealed the Tribunal’s thought processes about the information.

100. The First Respondent submitted that the Tribunal’s finding about the “*ring of truth*” should be read only as a reference to the cumulative nature of the parts of the letters extracted in the s.359A letter. It was acknowledged that there were other parts of Ms Jackson’s letters that made reference to much the same kind of information as the particular examples extracted in the s.359A letter, but submitted that the letters were quite repetitive.
101. It was also pointed out that there was a distinction between information and documents (see *SZINKO* at [23]), reiterated that s.359A did not always require provision of the whole of a document containing information and contended that where the sponsor had made a number of fairly repetitive allegations over a period of time (particularly in relation to financial affairs) it was not necessary for the Tribunal to put to the Applicant every single occasion on which she had made such allegations. Rather, it was said to be sufficient that the Tribunal had identified specific allegations it considered would be the reason or part of the reason for affirming the decision under review. It was further submitted that insofar as the Applicant had contended that particular words the sponsor used had to be put to the Applicant, that was not the case and that the Tribunal had put the particular allegations on which it intended to rely.
102. It was also contended that the consistency between the matters particularised in the s.359A letter and the manner in which the Tribunal decision proceeded led to an inference that the Tribunal had considered at the time of writing the s.359A letter that the items in the letter were the items of information that would be the reason or part of the reason for affirming the decision under review.
103. Insofar as the Applicant relied on the fact that the Tribunal had preferred Ms Jackson’s “*version of events*”, it was submitted that it was relevant that the Tribunal’s reference to Ms Jackson’s “*version of events*” appeared (at paragraph [45] of its reasons) in the last sentence of its consideration of credibility and was immediately followed by the

Tribunal's findings of fact. In its findings about the relationship the Tribunal was said to have set out relevant aspects of the sponsor's version of events (in relation to the financial aspects of the relationship, the nature of the household, the social aspects of the relationship, the nature of the commitment and other relevant considerations). It was submitted that the Applicant's contention divorced the quoted phrase from its context in the Tribunal decision and that in light of this structure it was apparent that the only "*events*" to which the Tribunal had referred in paragraph [45] were those set out subsequently in the balance of its reasons. This was also said to be a strong indication that it was only the items of information referred to in the s.359A letter that were the matters that the Tribunal considered would be the reason or part of the reason for the decision and that the rest of the information in the correspondence was not within s.359A(1) of the Act.

104. Similarly, the First Respondent submitted that the Tribunal's reference to "*the context and the content*" of Ms Jackson's letters cumulatively should be read as a reference only to the information in fact provided in the s.359A letter and not as an indication that the Tribunal was relying on everything said in all the sponsor's letters and statements in a cumulative way. The First Respondent submitted that there was no indication that the Tribunal had considered that all of the information in the letters would be the reason or part of the reason for its decision and that the fact that the Tribunal had turned its mind to the obligation under s.359A(1) and set out the matters which it did consider would be part of the reasons for its decision supported the conclusion that it considered only those matters would be part of the reason for its decision.
105. The First Respondent also submitted that some of the aspects of the letters relied upon by the Applicant related to the wishes of the sponsor, not the intention or commitment of the Applicant and hence could not be evidence that was probative of the question of the Applicant's intention at the time of the visa application.
106. In relation to the Applicant's alternative contention that certain specific items of information in the letters should have been put to him under s.359A of the Act, the First Respondent submitted that it was insufficient that there was information that "*might*" affect the ultimate

decision, as it had to be something that the Tribunal considered “*would*” have that effect. It was contended that the particular matters referred to by the Applicant did not give rise to a failure to comply with s.359A. First it was said that the existence of evidence about domestic violence within a relationship did not have any necessary bearing on the genuineness of that relationship. It was pointed out that one of the particulars of information in the s.359A letter had included the sponsor’s allegation that the Applicant just wanted to use her to stay in the country and suggested that this sufficed. It was also submitted that the Tribunal had provided adequate particulars of allegations about the Applicant’s cheating and the fact that he had been kicked out. It was contended that the fact that the sponsor wanted a divorce and the information about a car did not have any necessary bearing on the Applicant’s commitment to the relationship or direct bearing on the criteria for the visa. It was also submitted that there was no suggestion that the Tribunal considered that the information about the AVO would be part of the reason for its decision.

107. In addition, the First Respondent contended that while the s.359A letter referred to only one period in which there was no cohabitation (whereas the sponsor’s correspondence referred to several different periods), what concerned the Tribunal was not the length and nature of any particular period of separation, but rather the fact that the Applicant’s evidence that there was only one short period of separation was inconsistent with the sponsor’s letters. This was said to have been put to the Applicant in the s.359A letter. It was also submitted that the Tribunal’s acceptance that the parties had cohabitated for a period of time constituted a finding in favour of the Applicant and could not support any inference that the Tribunal considered the information in that respect would be the reason or part of the reason for the decision.
108. In response to the Applicant’s submission that the s.359A letter was deficient in that it referred to only one instance of cheating (whereas the sponsor made several allegations of cheating), the First Respondent contended that this overlooked the fact that the manner in which the Tribunal set out the allegation that the sponsor had caught the Applicant cheating suggested that it was the overall fact of infidelity, rather than specific instances of infidelity, that concerned the Tribunal. Counsel for the First Respondent also contended that the fact that

someone cheated in a relationship was not necessarily an indication that he or she did not have a commitment to his or her partner and that the Tribunal was entitled to take that view and did not have to put such allegations in the s.359A letter. The First Respondent also submitted that while the cheating allegations had not been extracted separately by the Tribunal, there was no individual finding in that respect and that such matters were bound up in findings about other aspects of the relationship.

109. The First Respondent submitted that Ms Jackson's view that the Applicant used her in order to get a visa was not information, but rather an inference drawn from the extracts from her letters that had been put to the Applicant in the s.359A letter. It was also submitted that the s.359A letter had addressed the possibility of this conclusion in suggesting that the information extracted could lead the Tribunal to infer that the reason that the Applicant married Ms Jackson was to attempt to obtain a visa.
110. The First Respondent submitted that the question of family violence would arise only if the Applicant was otherwise eligible for the visa he sought (because it was a time of decision criterion) and that as the Tribunal had formed the view that the Applicant's relationship with his sponsor was not one which satisfied the time of application criterion in cl.820.211 there was no need for it to consider the issue of family violence. It was contended in these circumstances that there was no indication that the Tribunal considered that any evidence given by the Applicant's sponsor about family violence would be the reason or part of the reason for affirming the decision under review.
111. Subsequently, in post hearing submissions in reply the Minister submitted generally that there was no obligation on the Tribunal under s.359A (1) in respect of *any* of Ms Jackson's correspondence because such correspondence came within the exception in s.359A(4)(b) of the Act. This argument was put on the basis that the s.359A(1) obligation did not apply to information that was referred to in the reasons for decision of a delegate where a copy of such reasons had been given to the Tribunal by the Applicant (see *Minister for Immigration and Citizenship v Chamnam You* [2008] FCA 241 at [16] per Sundberg J).

112. It was contended that as all the correspondence from Ms Jackson was referred to in the delegate's decision and a copy of the delegate's decision was given to the Tribunal by the Applicant, there could be little doubt that the Applicant intended that the Tribunal should look at that correspondence. It was suggested that this was a sufficient basis to find that the Applicant gave the information in the correspondence to the Tribunal for the purposes of the review application (see *NBKT v Minister for Immigration and Multicultural Affairs* (2006) 156 FCR 419; [2006] FCAFC 195 at [1] per Gyles J, [2] per Stone J and [63] per Young J) even though the Applicant was not the author of the correspondence (*SZGPQ v Minister for Immigration and Citizenship* [2007] FCA 648 at [52]).

Consideration

113. As indicated, s.359A(1) of the Migration Act requires the Tribunal to give to the Applicant clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review. It must also ensure as far as reasonably practicable that the Applicant understands why the information is relevant to the review and the consequences of it being relied on in affirming the decision under review. However the obligation under s.359A(1) does not apply to information "*that the applicant gave for the purpose of the application for review*" (see s.359A(4)(b) of the Act).
114. First, (and contrary to any suggestion that what the Tribunal considered would be the reason or part of the reason for affirming the decision that was under review is to be determined only by having regard to the matters addressed in the Tribunal's reasons for decision) it is important to bear in mind that, as the plurality stated in *SZBYR* at [17]:

The statutory criterion does not, for example, turn on "the reasoning process of the Tribunal," or "the Tribunal's published reasons." The reason for affirming the decision that is under review is a matter that depends upon the criteria for the making of that decision in the first place. The Tribunal does not operate in a statutory vacuum, and its role is dependent upon the making of administrative decisions upon criteria to be found elsewhere in the Act. The use of the future conditional tense ("would be") rather than the indicative strongly suggests that the operation of s

424A(1)(a) is to be determined in advance - and independently - of the Tribunal's particular reasoning on the facts of the case.

115. In other words the focus of s.359A is not on the Tribunal's reasons, but rather (as pointed out in *SZBYR*) on the Tribunal's state of mind at an earlier stage and whether at such earlier time it considered particular information "would be" part of the reason for affirming the decision under review.
116. In *Khan v Minister for Immigration and Citizenship* (2011) 192 FCR 173; [2011] FCAFC 21 the Full Court of the Federal Court considered the scope of s.359A of the Act in circumstances where the Tribunal had affirmed a decision to cancel a subclass 457 visa on the basis that a visa applicant was no longer employed by his sponsor. Neither the Department nor the Tribunal had informed the visa applicant of letters his former employer had written to the Department accusing him of fraud and requesting cancellation of the sponsorship. The Tribunal did not refer to the fraud allegations in its reasons for decision. The Minister had contended that s.359A(1) did not apply because there was no indication that the allegations in the letter were, or that at any time the Tribunal considered they "would be", the reason or part of the reason for affirming the delegate's decision. However the Full Court found that the Tribunal had failed to comply with s.359A of the Migration Act. Buchanan J stated at [45]:

45. In part, this argument depends on the reliability of the assumption, to which I earlier referred, that the MRT had definitely put Mr Sangha's accusations out of its consideration at the outset, and had other information permitting it to do so. The assumption is a critical one because, otherwise, the accusations made would clearly be relevant to matters which the RMT had to consider, including whether Mr Khan had breached his visa conditions or been untruthful to the Department. It is very difficult to see how credible information of that kind could be excluded at the outset from the class of information that would be part of a reason for affirming a decision to cancel a visa. As the obligation arises during the course of the review it is not sufficient, in order to exclude it, merely to point to the reasoning disclosed in the decision after the review has been conducted and completed. And, as I earlier pointed out, it became clear after the appeal was heard that the Minister was not in a position to defend the assumption which was offered in argument. I would therefore not accept the Minister's argument on this point.

117. Buchanan J found at [55] that in the circumstances, and given the nature of the cancellation decision, the visa applicant was “*entitled to know the circumstances in which his sponsor said his sponsorship had been withdrawn*” and that:

...He was therefore entitled to know not only about the existence of Mr Sangha’s two letters but to know their content. It was those letters (and in particular the first of them) which disclosed to the Department (whether falsely or not) the circumstances in which the sponsor withdrew support from Mr Khan. None of those things were communicated to Mr Khan. They could not be quarantined from the operation of s 359A of the Act either.

118. Flick J held in *Khan* that the failure on the part of the Tribunal to make a copy of the sponsor’s letters available to the visa applicant (or to at least disclose the substance of the allegations therein) amounted to jurisdictional error on the basis, *inter alia*, that such letters contained information that fell within s.359A of the Act. His Honour acknowledged (at [82]) that s.359A did not require the provision of all the information that “*could*” form the basis for the decision, but suggested that it would be “*odd*” to conclude that matters which the Department’s own guidelines or policy prescribed as matters to be taken into account were not matters that “*would be the reason, or a part of the reason, for affirming the decision that is under review*”. Relevantly, Flick J also suggested (at [82]) that the fact of omission of any reference to the letter or its contents in the reasons for decision could not preclude the application of s.359A of the Act. Yates J agreed that by failing to give particulars of the information constituted by the letters the Tribunal had failed to comply with its obligation under s.359A(1) of the Migration Act (at [87]).

119. Thus s.359A may apply to information that has come to the attention of the Tribunal during the review, notwithstanding that because of subsequent events (including, for example, comments by an applicant at the Tribunal hearing or any comment or response to a s.359A letter) by the time of its decision the Tribunal no longer considered such information would be part of the reason for affirming the decision under review (see *Kanagal* at [59]).

120. It is nonetheless the case that the Tribunal’s reasons for decision provide a starting point and may provide an indication as to whether or

not particular information was information that the Tribunal at an earlier stage considered would be the reason or part of the reason for affirming the decision under review. However, contrary to the First Respondent's submission, the extent to which the Tribunal's decision reflected information that was put to the Applicant in the s.359A letter does not of itself warrant an inference that the s.359A letter contained particulars of all the information that enlivened s.359A. As discussed further below, when regard is had to the Tribunal's reasons for decision it is not supportive of the First Respondent's contention that there was no failure to comply with s.359A(1) of the Act.

121. In that respect, I am not persuaded that a s.359A letter should be read in the manner contended for by the First Respondent by reference to the principles in *Wu Shan Liang* which are applicable to a Tribunal decision. On the contrary, the requirements of s.359A are strict (see for example *SZEOP v Minister for Immigration and Citizenship* [2007] FCA 807 at [36] per Rares J).
122. The proper approach to the adequacy of a s.359A letter was considered by the High Court in *SZBYR*. The plurality suggested (at [17]) that material said to be information should contain in its terms “*a rejection, denial or undermining*” of the applicant's claims. The Applicant's claims were not limited to a claim that he was the spouse of Ms Jackson at the time of the application. He also made claims to meet the time of decision domestic violence criterion. Hence, insofar as the First Respondent submitted that the only potentially relevant information during the Tribunal review was information that related to whether the Applicant and the sponsor were spouses at the time of visa application (because this was the issue on which the Tribunal ultimately made its decision) such an approach is unduly restrictive, having regard to the fact that the operation of s.359A(1) (which is the equivalent to s.424A in relation to the former Migration Review Tribunal) is to be determined “*in advance*” and “*independently*” of the Tribunal's particular reasoning on the facts of the case.
123. In this case the issue of the application of s.359A arose in the context of a consideration by the Tribunal of whether Mr Bani Hani met the criteria for a Partner (Temporary) (Class UK) visa, the relevant subclass of which was Subclass 820. At the relevant time,

cl.820.211(2) required that at the time of application the Applicant must be the spouse or de facto partner of an Australian citizen, Australian permanent resident or eligible New Zealand citizen who was his or her sponsor. In addition, Subclass 820 contained time of decision criteria (see cl.820.221) (including the provision relating to domestic violence which could be relied upon where a spousal relationship that was in existence at the time of the application had ended).

124. As the Tribunal set out in its statement of decision and reasons, the issues before the Tribunal were whether Mr Bani Hani and Ms Jackson were ever spouses; if so, whether there were compelling circumstances to waive the Schedule 3 requirement that an applicant be the holder of a substantive visa at the time of the visa application; and, if so, whether the relationship had ended and Mr Bani Hani was a victim of domestic violence committed by Ms Jackson (having regard to the fact that notwithstanding that a relationship had ended, in such circumstances the visa applicant may be able to satisfy a time of decision criterion for a Subclass 820 visa).
125. The Tribunal concluded that it was not satisfied that at the time of the visa application Mr Bani Hani was Ms Jackson's spouse within the definition of spouse in s.5F of the Migration Act having regard to all the circumstances of the relationship, including the matters set out in reg.1.15A(3) of the Migration Regulations. It found that he did not satisfy the time of application criterion in cl.820.211. Hence the Tribunal found it unnecessary to go on to consider the other issues of the Schedule 3 requirements or the time of decision criteria in its reasons for decision. This does not mean that information that undermined the Applicant's claim to satisfy the Schedule 3 requirements or time of decision criteria would not, at an earlier time (see *SZBYR* at [17] and *Khan*), have constituted information that enlivened the s.359A(1) obligation.
126. Information relevant to an issue raised by any of the applicable criteria for the visa in question may be material that, at a time prior to the Tribunal's decision, the Tribunal considered would be part of the reason for affirming the decision under review even though it did not ultimately play any part in the Tribunal's reasons for decision, for

example because the Tribunal found that the applicant failed to meet one applicable criterion for the class of visa in question and hence did not address other applicable criteria.

127. On this basis, information that constituted a rejection, denial or undermining of the Applicant's claims of domestic violence committed by the sponsor may be seen as information that the Tribunal considered (at an earlier time) would be part of the reason for affirming the decision under review (albeit it was not ultimately relied on in the Tribunal's reasons for decision).
128. It is also the case that by the time the matter came before the Tribunal there was no suggestion (by either Mr Bani Hani or Ms Jackson) that a spousal relationship was still in existence. It does not follow that the correspondence or any part of the correspondence from Ms Jackson to the Department would not have been information that the Tribunal considered would be the reason or part of the reason for the Tribunal's decision, having regard to the time of application criteria for the visa in issue. Moreover, information about events after the time of application may be relevant to the genuineness of the relationship at the time of the application and the Applicant's commitment at the time of the application (even if there was no such relationship by the time of the Tribunal review).
129. While counsel for the Applicant made general references to notions of procedural fairness, as the First Respondent submitted, what is in issue is whether the statutory obligation in s.359A(1) has been met and not whether there has been a denial of procedural fairness as such. It is the case that common law rules of procedural fairness do not necessarily require a decision maker to provide a person with all the documents in which information is contained (*Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88; [2005] HCA 72; *NAVM v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 99). However, as Rares and Jagot JJ stated in *SZQHH v Minister for Immigration and Citizenship* (2012) 200 FCR 223; [2012] FCAFC 45 at [30] in relation to common law procedural fairness "...procedural fairness required that the applicant be given the substance of the credible, relevant and significant information available to the [decision maker] on an issue in

*the review, of which the applicant was not already on notice.” As their Honours pointed out at [31] “...the substance of such information is, **generally**, distinct from the particular mode or source of its expression” (emphasis added) and “In general, the decision-maker need not disclose more than the substance of the information, however it has been conveyed to him or her.”*

130. Their Honours went onto to state:

...The position may be different if the particular form in which the information was conveyed itself affects the meaning of the information or because some unusual or particular characteristic has a bearing on its credibility, relevance or significance. For example, a decision-maker might put to a person information that had been taken out of context. Depending on the circumstances, such conduct might fall short of what procedural fairness would require unless the decision-maker also identified the context or the way in which the context affected the information being put (emphasis added).

131. Similarly, as Flick J pointed out in *SZNGO* (at [23]) in relation to s.424A(1) (the equivalent to s.359A(1) of the Act):

*There may be circumstances in which the requirement to “give” information to which s 424A applies may not extend to a requirement to disclose the entirety of any document in which such “information” is contained. In those cases it may not matter for the purposes of making a decision affirming a refusal of a protection visa that the “information” in question is but part of a document or report touching other matters or containing diverse other matters. In those cases the disclosure of that specific part of a much lengthier document may be sufficient. But “information” for the purposes of s 424A cannot in all cases be clinically divorced from the context in which it appears. How much of that surrounding context must also be disclosed must necessarily depend upon the facts and circumstances of each individual case. In some cases it may be necessary to identify the “source” from which information has been obtained. Thus, in *SZLIQ v Minister for Immigration and Citizenship* [2008] FCA 1405 Buchanan J concluded that extracts from a published book and the source of that material should have been disclosed. Indeed, the extent of disclosure may not necessarily be confined to the disclosure of material which ensures that a particular part is not rendered misleading; the touchstone is that ss 424A and 424AA require the disclosure of so much as to ensure that the*

opportunity to “comment ... or respond ...” is meaningful. In some cases the disclosure of the “substance” of information may be sufficient (NAVM v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 99 at [33]); in other cases “clear particulars” may require more (emphasis added).

132. Insofar as the First Respondent appeared to take issue with the reasoning of Flick J in *SZNGO*, that decision is binding on this court. Moreover the fact that the facts in *SZNGO* are distinguishable from those in this case does not detract from the relevance and applicability of the principle that s.359A (like s.424A) requires disclosure of so much as to ensure that the opportunity to comment or respond is meaningful.
133. The First Respondent appeared to submit that the Applicant’s awareness that Ms Jackson was the author of the letters and of the dates of her letters was relevant. While this may distinguish the facts considered in *SZNGO*, it does not address the issue of whether it was necessary under s.359A(1) to put all the correspondence, the substance of such correspondence or specific allegations (beyond those included in the Tribunal’s s.359A letter) to the Applicant under s.359A(1) of the Act in order to ensure that the opportunity to comment or respond was meaningful.
134. I am satisfied, having regard to the applicable criteria, the nature and extent of the material in Ms Jackson’s correspondence and also the Tribunal’s reasons for decision, that the information it considered would be the reason or part of the reason for affirming the decision under review extended beyond the matters particularised in the s.359A letter and hence that the Tribunal failed to comply with s.359A(1) of the Act, thus falling into jurisdictional error.
135. As explained further below, in the particular and unusual circumstances of this case and having regard to the nature and content of the letters and the fact that the Tribunal relied upon all of Ms Jackson’s letters as her “evidence” as to the couple’s relationship at the time of application, including the “detailed” letters looked at “cumulatively” and the “context” of her letters (as opposed to the “version of events” given by Mr Bani Hani), in order to ensure that the Applicant’s opportunity to comment on or respond to Ms Jackson’s “evidence” was meaningful, it

was necessary for the Tribunal to put to him for comment not merely the selected individual comments which it had extracted in the s.359A letter, but the whole of that correspondence.

136. It is clear from the Tribunal's reasons for decision that the Tribunal treated all of Ms Jackson's letters as her evidence, which it preferred to the evidence of Mr Bani Hani in circumstances where neither the whole of that evidence, nor the substance of that evidence, had been put to him for comment. It did not limit its consideration to the parts referred to in the s.359A letter. Rather, the Tribunal specifically relied upon the whole of Ms Jackson's letters, not only in dealing with specific inconsistencies between particular claims she made and Mr Bani Hani's evidence, but also more generally, including in relation to Mr Bani Hani's credibility.
137. For example, in preferring a specific aspect of Ms Jackson's evidence in support of the inference that the only reason Mr Bani Hani married her was to attempt to attain a visa, the Tribunal had regard to Ms Jackson's "*detailed letters when looked at cumulatively*". It is the case that the Tribunal's view that Ms Jackson's detailed letters when looked at cumulatively had a "*ring of truth*" particularly when compared with Mr Bani Hani's evidence can be seen as part of its thought processes which would not have to be put to an applicant for comment, but this does not mean that the letters themselves did not constitute information within s.359A(1) of the Act.
138. It is apparent that the information to which the Tribunal had regard was the "*whole of the content*" of the letters. This was reinforced by the Tribunal's consideration of Ms Jackson's letters as her "*evidence*". The Tribunal preferred Ms Jackson's "*version of events*" in relation to the nature of the relationship. Contrary to the First Respondent's submission that this supported the view that the Tribunal had regard only to the specific matters included in its s.359A letter, it had regard to the whole of the content of the detailed letters and their context when looked at cumulatively in considering the evidence of Ms Jackson in relation to the relationship and whether the requirements of s.5F were met at the time of the visa application.
139. Moreover, when the Tribunal turned to consider specific aspects of the relationship (as required by the definition of "spouse" in the Migration

Act and Regulations) it had regard to “*Ms Jackson’s letters*” (beyond the limited extracts in the s.359A letter) in making relevant findings.

140. It is the case that the letters contained some material that was not directly relevant to the visa criteria in issue or that was not in itself such as to undermine Mr Bani Hani’s claims. It is also the case that usually it will be sufficient to disclose the “*substance*” of information. Nonetheless, consistent with the approach taken in *SZNGO* at [23], this is a case in which it was necessary that the context of the specific items of information in Ms Jackson’s letters relevant to particular factors (such as those specified in reg.1.15A(2)) ought also to have been disclosed in order to ensure that the Applicant had a meaningful opportunity to comment or respond.
141. In circumstances where (as outlined above and discussed further below) so much information was contained in Ms Jackson’s letters of relevance to the Tribunal’s obligation under reg.1.15A to have regard to all the circumstances in determining whether Mr Bani Hani was the spouse of Ms Jackson within s.5F of the Act, where the Tribunal treated those letters as her “*evidence*” and had regard to the overall context and content, in my view the Tribunal was obliged under s.359A(1) of the Act to put the whole of the correspondence (and witness statements) to the Applicant to give him a meaningful opportunity to comment. Ms Jackson’s letters also addressed the history of the relationship and in particular, the issue of commitment. They constituted information that would be part of the reason for affirming the decision under review. Mr Bani Hani was never afforded the opportunity to make a meaningful response to the details in those letters including not only the reiteration of accusations but also separate allegations of repeated conduct as well as the general tenor (what the Tribunal regarded as the “*context and detail*” of Ms Jackson’s letters) to which the Tribunal had regard.
142. If that is wrong, then in any event it was necessary for the Tribunal to put to the Applicant specific adverse aspects of the information in the sponsor’s letters that went beyond those matters that were included in the s.359A letter.
143. Having regard to the unusual circumstances in this case, the particular content of Ms Jackson’s letters and the Tribunal’s treatment of these

letters as Ms Jackson's evidence, I do not accept that the information that the Tribunal considered would be the reason or part of the reason for affirming the decision under review was limited to the specific aspects of those letters referred to in the s.359A letter. While some factual allegations were included in the s.359A letter, this failed to put the Applicant on notice of the full extent of the allegations on relevant matters made by Ms Jackson.

144. I am not persuaded by the Minister's submission that the fact that the Tribunal decision followed the terms or format of the s.359A letter (which I note reflected the reg.1.15A factors) means that it can be inferred that the only matters that the Tribunal considered would be the reason or part of the reason for affirming the decision under review were those listed in the s.359A letter. Rather, the Tribunal reasons for decision reveal that the Tribunal had regard to the specific matters referred to in reg.1.15A of the Migration Regulation as matters which the decision-maker was required to consider as part of all the circumstances of the relationship. Furthermore, as pointed out by the Full Court of the Federal Court in *Khan* (see Buchanan J at [45]):

As the obligation arises during the course of the review it is not sufficient, in order to exclude it, merely to point to the reasoning disclosed in the decision after the review has been conducted and completed...

145. I am satisfied that the Tribunal erred in failing to put to the Applicant under s.359A(1) particulars of all the items of information in Ms Jackson's correspondence of direct relevance to the circumstances of the relationship for the purposes of the definition of spouse (including information relevant to the factors specified in reg.1.15A(3)).
146. Some aspects of the information in the July 2010 Letter were put to the Applicant in the s.359A letter (including about the start and early stage of the relationship and Ms Jackson's claim that the Applicant never helped her pay the rent, bills or food). However, other information that would be part of the reason for affirming the decision under review was not put to the Applicant for comment. For example, while the Tribunal had regard to the fact that "*Ms Jackson's letters*" suggested that there were "*lengthy periods*" where she and Mr Bani Hani were not cohabitating, the Tribunal failed to include in the s.359A letter her early

claim that on 4 May 2010 she and Mr Bani Hani had separated until 11 May 2010 (one of the periods of separation referred to in the Tribunal decision). Other specific matters of direct relevance to the criteria in issue (but not included in the s.359A letter) were Ms Jackson's claim that the Applicant brought a girl to her home on 15 May 2010 and that a Lebanese woman told her that after the Applicant obtained residency he was going to be looking for a young girl. The Tribunal also failed to include in the s.359A letter Ms Jackson's early claims in the July 2010 Letter that Mr Bani Hani had been angry and violent to her (as she explained in some detail). This information (which was treated as Ms Jackson's evidence) bore on whether the relationship between Mr Bani Hani and Ms Jackson was genuine at the time of the visa application. In particular, it was relevant to his commitment.

147. The claim in Ms Jackson's witness statement of 11 June 2010 that when she first met the Applicant he was "*very urgent*" to get married and was on a student visa was included in the s.359A letter, as was her claim that when asked whether he paid for the rent he had said "*I don't pay for nothing*" and threw her rental card at her. However this witness statement contained more detailed evidence about the relationship. For example, Ms Jackson also stated:

...Two weeks after we were married the relationship started to deteriorate. We started to fight because of many reasons. On a number of occasions the relationship deteriorated to the point where I wanted to terminate the relationship. Within the last two months the relationship has deteriorated to the point where we are constantly fighting.

148. This further evidence about what occurred so soon after the marriage should have been put to the Applicant to ensure that he could comment in a meaningful way on his commitment to the relationship at the time of the visa application.
149. The Tribunal put to the Applicant the parts of the September 2010 Letter in which Ms Jackson claimed they had not lived together, that she caught him cheating, and that she had had nothing to do with him since July 2010, although he used her address for letters from the Department.

150. However, in addition, in this letter Ms Jackson alleged that Mr Bani Hani had used her to get a visa to stay in Australia. This evidence (in particular the allegation about Mr Bani Hani's intention) bore directly upon whether the relationship and Mr Bani Hani's commitment were genuine. Ms Jackson made several claims relevant to this issue:

"He want to use me to stay this country";

"He try to use me and the school to get visa so that he can stay here";

"He's not leaving (sic) with me. I been con...";

"his (sic) user and desperate to stay in Australia. So he use me"; and

"I don't want to sponsor Salem Ahmad Bani Hani is enough to help him before. Why I continue is not leaving (sic) with me. My friends told me is not right to sponsor him because we not leaving (sic) together. We not even have relationship. Thank you."

151. While the Tribunal put extracts from this letter to Mr Bani Hani in the s.359A letter, in its reasons for decision it stated that Mr Bani Hani's evidence about cohabitation appeared to be inconsistent with Ms Jackson's "letters" and statement to the police (despite not putting to him all such evidence from Ms Jackson about their cohabitation and the "periods" of time Mr Bani Hani was living with her).
152. The Tribunal's s.359A letter did put to the Applicant a brief extract from the November 2010 Letter in which Ms Jackson claimed: *"We fight too much for everything like food and other expenses for any bill. He just want to use me to stay in this country. He work 6 days a week he can't even spend food to me or nothing."* However, at the least, the Tribunal ought also to have put to the Applicant (as information relevant to his commitment) Ms Jackson's "evidence" that he was "still cheating", that she had read a text message to a Korean girl about what they planned after he obtained his residence, that she had kicked the Applicant out of her home and that he was not genuine but had used her as he was desperate to stay in the country. This information bore upon whether the relationship was genuine at the time of application.
153. It is notable that Ms Jackson's letter of 14 March 2011 was sent to the Department after Mr Bani Hani had provided a supportive statutory

declaration from Ms Jackson dated 30 November 2010. The only information from that letter included in the s.359A letter was the claim that Mr Bani Hani had Ms Jackson sign papers stating that he supported her financially and helped her pay bills but that in fact “*he never do anything*”.

154. However in this letter Ms Jackson also advised the Department that it was not a genuine relationship, and stated not only that she and Mr Bani Hani had been separated since 27 January 2011 and that they had not lived together since December 2010, but also that he had too many love affairs (including with a Lebanese woman and with a friend of Ms Jackson), that she would be applying for a divorce, that he and his legal adviser had tried to con her and, significantly, that the Applicant just wanted to use her to stay in Australia. This information was part of the content and context of Ms Jackson’s letters that bore upon whether the relationship was genuine. It was not included in the s.359A letter.
155. The Tribunal did not put any part of Ms Jackson’s letter of 3 May 2011 to Mr Bani Hani in the s.359A letter. However the information that she reiterated that they had been separated since December 2010, that he was “*still*” cheating with two other women (including the Lebanese woman who he could not marry as she was not divorced from her husband), that she had caught them together in her home, that this woman and Mr Bani Hani had used her and (critically) that Mr Bani Hani married her so he could stay in Australia, bore upon whether the relationship was genuine. The earlier part of this letter, while relating to events after the visa application, provided the context for Ms Jackson’s “*evidence*” that Mr Bani Hani married her so he could stay in Australia. In addition, the information that Ms Jackson accused Mr Bani Hani of setting her up by asking her to attend at his work and then calling the police and making up a story about her home so he could get an AVO against her bore upon whether or not he had been a victim of domestic violence (as well as the issue of whether Mr Bani Hani had a genuine commitment to the relationship at the time of the visa application).
156. Nothing from Ms Jackson’s statement of 4 May 2011 in response to the Applicant’s AVO application was included in the s.359A letter. However her allegation that the Applicant was seeking an AVO because

he had been advised that although the sponsorship had been withdrawn, if he was a victim of domestic violence by the sponsor he may be allowed to stay in Australia, and her claim that the Applicant had been violent to her in September/October 2010 bore upon whether or not the Applicant had in fact been a victim of domestic violence.

157. The Minister submitted that information about domestic violence and Ms Jackson's allegations in relation to being set up by Mr Bani Hani formed no part of the information that would be the reason or part of the reason for affirming the decision under review having regard to the fact that the issue of domestic violence was not the basis for the Tribunal decision. However, as indicated, the application of s.359A is to be determined at an earlier time having regard to the applicable criteria (see *SZBYR*). Ms Jackson's allegations, in particular her allegation that the Applicant was seeking an apprehended violence order against her because he had become aware (or his solicitor had advised him) that although the sponsorship had been withdrawn, if he was a victim of domestic violence by the sponsor he may be allowed to stay in Australia (and also her claim that he had been violent to her in September/October 2010) bore directly upon whether or not the Applicant had in fact been a victim of domestic violence. While the Tribunal did not ultimately decide this issue (given its reasoning in relation to the existence of a genuine spousal relationship at the time of the visa application) it cannot be said that at an earlier time in the review information relevant to this issue was not information that the Tribunal considered would be part of the reason for affirming the decision under review.
158. In addition, this information could not be excluded as irrelevant to the issue of mutual commitment, insofar as Ms Jackson claimed that the circumstances of the alleged domestic violence had been engineered by Mr Bani Hani for the purposes of obtaining his visa and also that the marriage relationship was part of a ploy by him to obtain a visa.
159. Further, directly relevant to the Applicant's motivation and the genuineness of his commitment, Ms Jackson stated in her letter of 3 May 2011 that: "*I realised that he only married me so he can stay in Australia permanently*" and "*[h]owever after the violent incident in October 2010, I realised that he was not going to change, he was*

always be violent towards me and that he was just really using me so he can stay in Australia". Again, this provided part of the context and content the Tribunal ultimately found significant.

160. There was no reference to Ms Jackson's letter of 5 May 2011 in the s.359A letter. In that letter Ms Jackson indicated that Mr Bani Hani would do anything to set her up so he could stay in Australia and told her that he did not need her anymore and that she should get lost. This information also bore upon whether or not the relationship was ever genuine.
161. Even if, notwithstanding the Tribunal's approach to Ms Jackson's evidence, s.359A(1) does not extend to the whole of Ms Jackson's letters or to the allegations described above, nonetheless, as the Applicant submitted there were specific items of information in the letters about a number of issues relevant to the "*spouse*" criterion (in particular to the factors in reg.1.15A(3)) that were not, but should have been, put to the Applicant under s.359A(1) of the Act as information that the Tribunal considered would be part of the reason for affirming the decision under review.
162. For example, the Tribunal found "[b]ased on Ms Jackson's letters" that it did not accept that there was any significant pooling of financial resources or significant sharing of day to day expenses. While the Tribunal's s.359A letter did extract four items from Ms Jackson's letters and witness statement in relation to financial affairs, these were not the only relevant parts of the letters and the Tribunal's findings about the financial aspects of the relationship were not based only on those four specific items included in s.359A letter (as distinct from Ms Jackson's letters in general).
163. Similarly, when the Tribunal considered the nature of the household, it reached findings based on Ms Jackson's "*letters*". It is the case that the Tribunal's acceptance that the parties cohabited for a period of time did not undermine the Applicant's claims, so that, in isolation, information which supported such a positive finding could not be characterised as information that would be the reason or part of the reason for affirming the decision under review (albeit that it may, as discussed above, form part of the context necessary to afford an applicant a meaningful opportunity to comment). The Tribunal considered Mr Bani Hani's

evidence that he and Ms Jackson briefly separated in June/July 2010, but found that Ms Jackson's "*letters*" suggested that there were "*lengthy periods*" when they were not cohabitating. However the information in relation to separation put to the Applicant in the s.359A letter was limited to one claim made by Ms Jackson in the September 2010 Letter in relation to a separation from July 2010 to September 2010. This was not the only information provided by Ms Jackson about periods of separation (consistent with the Tribunal's conclusion that her letters suggested that there were lengthy periods where they were not cohabiting). Even if s.359A did not require the Tribunal to put to the Applicant all of Ms Jackson's letters or all of the material relevant to reg.1.15A(3) factors, at the least the Tribunal failed to comply with s.359A(1) of the Act insofar as it failed to put to Mr Bani Hani the claims Ms Jackson made in her letters about various periods of separation.

164. Further, in considering "*the nature of the commitment*" the Tribunal referred to Ms Jackson's "*claims*" that she had caught Mr Bani Hani cheating on her and the fact that he denied this to be the case. However the s.359A letter only put to the Applicant one allegation of cheating, and it did so in the context of putting to him what was described as evidence concerning cohabitation. The Tribunal failed, however, to put to the Applicant the other "*evidence*" of cheating from Ms Jackson. This was clearly part of the reason for affirming the decision under review, having regard to the fact that the Tribunal preferred Ms Jackson's version of events. I note that (as discussed further below) in addition to the fact that all the allegations of cheating were not put to the Applicant in the s.359A letter, the relevance of cheating was not explained.
165. I am satisfied that the various allegations Ms Jackson made about cheating (part of the "*evidence*" the Tribunal preferred) were clearly within s.359A(1) and had to be put to the Applicant for comment as information that would be part of the reason for affirming the decision under review.
166. In essence, the Tribunal included limited examples of information from Ms Jackson's letters in the s.359A letter (such as one example of inconsistent evidence concerning the period of cohabitation), but not

all of the evidence about the periods they were not living together or all of the allegations about cheating. However in its reasoning about the nature of the Applicant's commitment the Tribunal relied on Ms Jackson's "evidence" that Mr Bani Hani had been cheating on her. It had regard to the fact that Mr Bani Hani denied this and had asserted that her "accusations" (sic) of his infidelity were based on her unfounded jealousies. The Tribunal preferred the sponsor's "version of events" and in that context referred to her "detailed" letters. In such circumstances, at least all the information in Ms Jackson's correspondence on these matters should have been put to the Applicant for comment within s.359A of the Act.

167. In addition, in the s.359A letter the Tribunal failed to explain the relevance of the information that was included in the letter in relation to cheating. There was reference to Ms Jackson's claim in the September 2010 Letter about catching the Applicant cheating, as follows:

Evidence concerning cohabitation

- *Ms Jackson's letter dated 22 September 2010 states in part: "Since July 2010 we are not live together because after 2 week 27 July 2001(sic) I catch his cheating...[I have had] nothing to do with Salem Ahmed Bani Hani since July 2010. He use my address his letters for to do Government."*

The above information is relevant because you gave evidence that apart from a few weeks in June/July 2010 you and Ms Jackson shared the same address at Surry Hills from March 2010 to May 2011.

Your evidence appears to be inconsistent with Ms Jackson's letters and statement to the police.

The inconsistency in evidence could lead the Tribunal to not accept your evidence concerning the periods of time you were living at Surry Hills. This could also lead the Tribunal to not accept your evidence about other aspects of your relationship with Ms Jackson. In particular the Tribunal could find that your relationship with Ms Jackson was never at any stage genuine and continuing.

This in turn would be a part of the reason for the Tribunal affirming the decision under review.

168. However there was no explanation in the s.359A letter of the relevance of the evidence in relation to cheating, apart from the Tribunal's general statement in relation to inconsistencies in the evidence in relation to cohabitation and its ultimate general reference to the relevance of all the information to the issues relevant to the definition of spouse. Rather, in the s.359A letter the Tribunal stated that the extracted part of the September 2010 Letter was relevant in relation to the issue of the periods of time the Applicant was living in Surry Hills. However of its nature (and as considered in the Tribunal's reasons for decision) the evidence of infidelity (Ms Jackson's "*claims (sic) that she had caught Mr Bani Hani cheating on her*") was relevant to the existence and nature of any mutual commitment.
169. In *Minister for Immigration and Multicultural Affairs v SZGMF* [2006] FCAFC 138 the Full Court of the Federal Court considered the Tribunal's obligation under s.424A(1)(b) (equivalent to the obligation in s.359A(1)(b)) to ensure, as far as reasonably practicable, that the visa applicant understood why the information set out in a s.424A letter was relevant to the review. In that case the opaque nature of the particulars of information provided in the Tribunal's s.424A letter meant that the use that the Tribunal could make of the particularised information was not self-evident (at [40]-[41]). The same may be said in this case. There was no adequate explanation by the Tribunal of the relevance of the one reference to cheating in Ms Jackson's letters which it did include in the s.359A letter. There was no practical or other difficulty in the way of the Tribunal telling the Applicant the relevance of the information that the Applicant had been cheating on the sponsor (for example to indicate that such information could suggest a lack of commitment). The general concluding statement in the s.359A letter that all of the information included may show the particular statutory criteria had not been met was insufficient to enable the Applicant to make a meaningful response in this respect.
170. Contrary to the Minister's suggestion that a s.359A letter should be construed in a less rigorous fashion, consistent with the approach to the Tribunal's decision taken in *Wu Shan Liang* (and cf *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228

CLR 294; [2005] HCA 24 and *SZSKO*) it is notable that in *SZSKO* Rares J suggested that the strict requirements in s.424A(1)(b) (the equivalent of s.359A(1)(b)) were “*necessary to avoid an applicant for review being left to choose between uncertain inferences that might otherwise be available in the notification*” (at [36]). As his Honour stated at [36] “[t]he tribunal does not fulfil the obligation imposed by s. 424A(1)(b) if it leaves it to chance that [the Applicant] ought to appreciate that relevance from the course of the hearing, or from other circumstances surrounding the way in which the review is being conducted.” Rares J also found that s.422B (the equivalent of s.357A of the Migration Act) reinforced the fact that parliament intended that there be strict compliance with the provisions of that part of the Act. The same may be said in relation to s.357A of the Act.

171. Thus, apart from the issue of whether the Tribunal put to the Applicant the requisite particulars of information that enlivened the s.359A(1)(a) obligation, the Tribunal failed to comply with s.359A(1)(b) by ensuring as far as reasonably practicable that the Applicant understood why the information in relation to cheating that was included in the s.359A letter was relevant to the review.
172. I have considered the Minister’s contention that even if there was information otherwise within s.359A(1) it was within the exception in s.359A(4)(b) as information the Applicant gave for the purposes of the review. This argument relied on the fact that in connection with the review application the Applicant (through his migration agent) had given the Tribunal a copy of the delegate’s decision.
173. The Minister submitted that as the delegate had referred (albeit briefly) to all Ms Jackson’s correspondence, there could be “*little doubt*” that the Applicant intended that the Tribunal look at such correspondence. This was said to be a sufficient basis to find that the Applicant gave the information contained in that correspondence to the Tribunal, even though he was not the author of such correspondence (see *Chamnan You*).
174. However the delegate’s decision simply referred to the fact that on specified dates the sponsor had provided letters withdrawing sponsorship (and had then requested reinstatement of the sponsorship). It did not describe the content of these letters, beyond the statement:

On each withdrawal occasion the sponsor claimed that the applicant had used the relationship to obtain a visa to remain [in] Australia only and that the relationship is not a genuine spouse one as defined in the Regulations. The sponsor has repeatedly claimed that the applicant had “cheated on her” and that they do not live together as a couple.

175. Insofar as reliance was placed on *NBKT*, that case concerned the issue of whether the Applicant had, by references in written submissions, in effect “*invited the Tribunal to look at her protection visa application and its attachments*” (Young J, with whom Gyles J and Stone J agreed) at [63]). This is not such a case. Indeed, as Young J pointed out at [59], the authorities about the scope of the s.424A(3)(b) exception (the equivalent of s.359A(4)(b)) “*highlight the importance of giving careful consideration to the nature of the information that is said to fall within s 424A(3)(b) and the circumstances in which it is communicated to, or elicited by, the Tribunal*”.
176. In this case the information in Ms Jackson’s letters was not uncontentious factual material (see *NBKT* at [60]). Having regard to the very general statement and limited description of the information in the delegate’s decision and the context in which the reference to the information was communicated I am not satisfied that the information in Ms Jackson’s correspondence that enlivened s.359A(1) (beyond the fact and dates of the letters withdrawing sponsorship and the very limited information described in the delegate’s reasons) was “*given*” to the Tribunal for the purposes of the review. That is particularly so given the detailed content and context of Ms Jackson’s “*evidence*”.
177. The extent of disclosure of Ms Jackson’s evidence in the delegate’s decision fell far short of disclosure of the varied allegations described above. In particular the general statement in the delegate’s decision did not include any information about periods of separation, as distinct from whether Mr Bani Hani and Ms Jackson “*lived together as a couple*”.
178. Ground 1 is made out and the matter should be remitted to the Tribunal for reconsideration according to law.

Ground Two

179. The second ground in the Further Amended Application is that the Tribunal decision “*was based upon a critical factual error*”.

180. The particulars to this ground are as follows:

In determining the social aspects of the relationship between the Applicant and the Sponsor, the Tribunal relied upon the fact that there was no evidence or suggestion that the Applicant and the Sponsor had ever taken holidays together. The Applicant's evidence to the MRT was that he and the sponsor spent 4 nights together in Melbourne in Christmas 2010 (see CB398 [19]).

181. Counsel for the Applicant indicated that while this ground was expressed as a contention that the decision of the Tribunal was based upon a critical factual error, it could also be expressed as a claim that the Tribunal had overlooked a piece of evidence, being the evidence referred to in the particulars.

182. It was pointed out that in the Tribunal's account of the Applicant's evidence at the Tribunal hearing it had recorded (at paragraph [19] of its reasons for decision) that the Applicant “*indicated that in Christmas 2010 they spent four nights together in Melbourne*”. This reference appeared in a paragraph describing the Applicant's oral evidence about cohabitation and the couple's relationship and joint activities. In that context, Mr Bani Hani was recorded as telling the Tribunal that he and Ms Jackson would have dinner together when he came home and that during weekends they would often attend parties and go out together. He told the Tribunal that his father visited Australia in November 2010 for a few weeks, that he stayed with them at their place in Surry Hills and that they went out together to sightsee. He indicated that at Christmas 2010 he and Ms Jackson had spent four nights together in Melbourne.

183. However in its findings and reasons in relation to the social aspects of the relationship, the Tribunal found that “*there is no evidence or suggestion that the parties have ever taken holidays together*”. The Applicant contended that this was clearly a matter of significance to the Tribunal and that the Tribunal's finding was inconsistent with the Applicant's oral evidence about what was said to be a vacation in

Melbourne for four days over the Christmas period. It was submitted that the inference should be drawn that although the Tribunal had set out this aspect of the evidence of the Applicant in the earlier part of its reasons, it was overlooked in the findings and reasons.

184. The Applicant submitted that the fact that the Tribunal saw the issue of holidays as significant enough to be referred to in the findings and reasons part of its decision made the evidence in that respect a sufficiently critical matter to give rise to a jurisdictional error. Reliance was placed on *Minister for Immigration and Border Protection v SZSRS* (2014) 309 ALR 67; [2014] FCAFC 16 in which the Full Court of the Federal Court considered whether a failure by the Tribunal to consider a supporting letter constituted jurisdictional error. In that context, the court endorsed the approach taken by Robertson J in *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99; [2013] FCA 317 and observed at [54] that:

... it is too narrow an approach merely to ask in a case such as this whether the ignored material is a claim or part of a claim on the one hand or evidence on the other. Such an approach may provide the answer in some cases, but not in all. That is because, as [Robertson J] also pointed out (at [98]), the Tribunal can fail to exercise its jurisdiction or fail to consider a claim in a number of different ways, including by ignoring evidence that is important to a claim, or ignoring evidence that, having regard to the course of its decision-making, acquires importance to the exercise of its jurisdiction...

185. In *SZSRS* the Court concluded that a letter in question was capable of corroborating oral evidence that a visa applicant had been baptised and was direct evidence in support of the claim that the visa applicant and her family were Christian. In this respect it was said to be important to her claims and to the exercise of the Tribunal's function.
186. The Applicant submitted that similar reasoning would apply to the evidence in issue in this case which was said to be relevant to the existence of a spousal relationship and that the Tribunal had ignored evidence that, having regard to the course of its decision-making, had acquired importance to the exercise of its jurisdiction.
187. However, as the First Respondent contended, it is important to have regard to the explanation by the Full Court as to why the factual error

in *SZSRS* went to jurisdiction. The Court made the point (at [56]) that the letter in question was “*capable of reconciling the supposedly conflicting oral and documentary evidence that apparently troubled the Tribunal*”. Importantly (at [58]), the Full Court expressed the view that the suggestion that jurisdictional error would necessarily be established if the ignored material was relevant in the sense that it might have had a bearing on the outcome of the review and was not so insignificant that the failure to take it into account could not have materially affected the decision “*puts the matter too widely*”. Their Honours reiterated that, as Robertson J had made clear in *SZRKT*, “*merely to ignore relevant material does not establish jurisdictional error*” (and see *SZSRS* at [58]).

188. That is what occurred in this case. While the question of whether the Applicant and the sponsor went on a holiday together over four nights in Christmas 2010 was of potential relevance to the question of whether the Applicant had a genuine commitment to the relationship (having regard to the relevance of social aspects of the relationship) it was not evidence that could reconcile conflicting evidence one way or the other. Nor was it a matter of “*central importance*” to the Applicant’s claim. The error did not amount to a failure by the Tribunal to consider the Applicant’s claim or an integer of the claim (*Minister for Immigration and Citizenship v SZNPG* (2010) 115 ALD 303; [2010] FCAFC 51 at [28])
189. I am not satisfied that the question of whether the Applicant and the sponsor went on a holiday was one that could be said to be a critical or central fact (see *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 77 ALD 402; [2003] FCAFC 231 at [19]-[20]). Rather, it was a peripheral fact in terms of analysis of the relationship as a whole which went to a question dealt with by the Tribunal under the heading “*social aspects*”. Moreover, the Tribunal did not make a clear finding “*against*” the Applicant in relation to this aspect of the relationship.
190. In all the circumstances, the finding that there was no evidence or suggestion that the parties had ever taken holidays together (in the face of evidence that they had gone to Melbourne for four nights together) is not demonstrative of jurisdictional error. While the existence of evidence concerning joint holidays could not be excluded as irrelevant

to the issue of mutual commitment, the finding in that respect did not amount to a “*critical step*”. Nor was the finding about whether or not the Applicant and his sponsor took holidays together a jurisdictional fact in the sense considered in *SFGB* at [19]-[20]. Further, this is not a case in which the possibility that the Tribunal might have come to a different conclusion had it not overlooked the evidence of the holiday could not be excluded in the sense considered in *W284 v Minister for Immigration and Multicultural Affairs* [2001] FCA 1788 per French J at [35].

191. This ground is not made out. However as jurisdictional error has been established on the basis contended for in Ground 1 the matter should be remitted for reconsideration according to law.

I certify that the preceding one hundred and ninety-one (191) paragraphs are a true copy of the reasons for judgment of Judge Barnes

Date: 10 March 2016